
THE OCCUPATION OF THE LAW: JUDICIARY-LEGISLATURE POWER DYNAMICS IN PALESTINIANS' TORT CLAIMS AGAINST ISRAEL

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ABSTRACT

The complex reality of the Israeli-Palestinian Conflict gives rise to violent confrontations between Palestinians and Israeli security forces, which frequently lead to bodily injuries and damage to property of Palestinian civilians. While victims of armed conflict are often forced to resort to international tribunals in order to seek redress for such grievances, the Israeli legislator has created a mechanism that allows Palestinians to bring tort claims against the State of Israel before Israeli civil courts. In the last decade, though, this legislation has become significantly more restrictive, effectively denying state liability for Palestinians' injuries. This Study is a

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first systematic attempt to empirically evaluate this unique compensation mechanism. Through the lens of scholarship on judiciary-legislature relations, as developed in the United States and in Israel, this study investigates the role of lower courts adjudicating the politically-charged tort cases of the Israeli-Palestinian Conflict. Employing both quantitative and qualitative methods, the Study utilizes content analysis of 245 decisions rendered by Israeli trial courts between 1992 and 2012, supplemented by in-depth interviews with relevant stakeholders. While scholars tend to focus on the interests of, and power struggles between, legislatures and supreme courts, this Article studies the relationship between law and politics in lower courts. It explores changes in the attitudes of courts towards Palestinians' tort claims against Israel, revealing the power dynamic between the Israeli legislature and civil trial courts. The Study shows a judicial attempt to defend lower courts' institutional independence despite the legislature's efforts to dictate a specifically desired judicial decision-making process.

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1. INTRODUCTION

The relationship between the three democratic branches has long troubled scholars from various disciplines. Specifically, scholars have struggled with defining the nature of the complex relations between courts and legislatures, in trying to understand how judicial decision-making, and consequently, the law itself, are affected by this dynamic. Much of the dialogue—at times battle—between these entities takes place through the process of legislation and statutory interpretation, turning this domain into fertile ground for the study of these institutional relations. Unfortunately, most of the work done towards the purpose of explaining this relationship and its bearing on the law has focused on supreme courts. As a result of this scholarly focus, while we seem to have some sense of what it means for a Supreme Court justice to act strategically, this is less clear for lower court judges. Yet, if we are interested in what constrains courts in their decision-making process and in the impact of the relations between the branches on statutory interpretation, studying the lower courts is of much importance.¹

The complexity of the relationship between courts and legislatures on the one hand, and the scarcity of meaningful analysis of lower courts' interaction with legislatures on the other hand, created the motivation for this Study. The main objective of this Study is to examine how lower courts react to a legislative change, aimed at altering their case law by confining their judicial discretion. In order to delve into this question, the research undertakes a case study situated at the heart of the Israeli-Palestinian Conflict (hereinafter, also "the Conflict"), a politically-charged backdrop which serves as an intriguing setting for investigating the relations between the legislature and the judiciary. The Study looks at tort claims filed by Palestinian civilians against the State of Israel ("the State") due to damages sustained from actions of the Israeli Military ("IDF"). The regulation of this issue was subject to a signifi-

¹ See Barry Friedman, *Taking Law Seriously* 265 (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper 21, Vol. 4, No. 2, 2006), http://lsr.nellco.org/nyu_plltwp/21 [<https://perma.cc/3W9T-GYS4>] ("Undoubtedly there are reasons to study the Supreme Court. It is a central policy-making institution in American government. Yet, for many of the questions being asked by scholars, studying the lower courts may make more sense.").

cant legislative change in 2002, which placed substantial hurdles in the path of Palestinians seeking remedy from Israel, and confined courts' discretion in deciding these sensitive claims. Yet, this important domain has been understudied, from a purely legal perspective and especially from a socio-legal point of view. It thus constitutes an ideal setting to apply the literature on judiciary-legislature relations to the context of lower courts adjudicating politically-charged cases in the face of a legislative change.

To this end, the Study conducts an empirical examination of trial court decisions in these cases.² Through content analysis of 245 court decisions rendered between 1992 and 2012,³ supplemented by several in-depth interviews with relevant stakeholders, the research explores changes that occurred in the attitudes of trial court judges towards the disputes in question, in reaction to the restrictive, anti-plaintiff legislation and the political climate in Israel. The methodology of this Study was designed to deal with the complexity of empirically studying judicial decision-making. By employing both quantitative and qualitative content analyses, it attempts to capture various aspects of judicial opinions. Additionally, interviews conducted as part of this Study provide social and political context which is not always reflected in court decisions themselves.

Based on these sources of data, this Study reveals the power

² The decision to focus on trial courts rather than appellate courts resulted from the nature of the research questions. *First*, because one of the goals of this Study was to examine the way courts approach said cases, from both a legal and a factual perspective, it was vital to zoom in on the first instance, where the facts are discussed in full, rather than examining whether the fact-finder had erred in its original decision. *Second*, this choice also relied on the accepted notion that trial courts and appellate courts exercise their discretion differently, particularly due to the fact that trial courts can receive a direct impression of the characteristics of the parties, their versions, and the injuries sustained. This had great significance for this Study, which aimed to examine the way trial courts respond in their decisions to plaintiffs' features.

³ The Study analyzed court decisions published in the "Nevo" commercial database (a total of 245 decisions). "Nevo" was chosen as it is used by the Israeli Supreme Court, most leading law firms, and the Israeli Ministry of Justice (comparable to "LexisNexis"). In order to control for errors that may exist in this database and to ensure that all published cases would be examined, the Author conducted searches in two other commercial databases ("Takdin" and "Pad'or"), used to a lesser degree in Israel. Cases were retrieved from both the magistrate and the district courts dockets because both levels adjudicate claims at first instance. The time frame for the Research was defined as ten years before and after the 2002 Amendment, which was enacted in August 2002.

dynamic between the Israeli legislature and the lower courts adjudicating the difficult tort cases of the Israeli-Palestinian Conflict. The Study shows a judicial attempt to defend lower courts' institutional independence and preserve a discretionary space for deciding cases, despite the legislature's efforts to control judges' decision-making process.

Section 2 begins by setting out the relevant legal and historical background regarding Palestinians' tort claims against Israel for damages inflicted by IDF. Section 3 proceeds with a review of the relevant scholarship, both American and Israeli, on the relationship between the judiciary and the legislature. Section 4 is devoted to a quantitative content analysis of the decisions in question. This Section describes some of the prominent characteristics of the claims, and compares decision-making patterns before and after the legislative change of 2002. Section 5 then provides a deeper look into issues invoked by the quantitative analysis, focusing on areas of judicial decision-making in which courts enjoy considerable discretion. Finally, Section 6 discusses the findings of the Study, suggests inferences to derive from it, and raises questions for further research.

2. BACKGROUND: FROM POLITICAL TURMOIL TO ANTI-PLAINTIFFS LEGISLATION

The complex reality of the Israeli-Palestinian Conflict creates frequent confrontations between Israel's security forces, particularly the IDF,⁴ on the one hand, and Palestinian residents of the Occupied Palestinian Territories ("OPT")⁵ on the other hand. These encounters often lead to property damage, personal injury, and even death of Palestinian civilians, at least some of whom were not involved in any hostilities. Events range from accidental explosion of land mines, to use of riot control techniques during protest, to drone attacks and large scale military operations, particularly in

⁴ Israel's security forces include IDF, police forces operating in the Occupied Palestinian Territories (mostly through the Border Police Unit), and the General Security Service. The Author focuses on IDF and military police activity in this Article, referred to jointly as IDF.

⁵ For the sake of brevity, this Author shall hereinafter refer to the plaintiffs in the claims as "Palestinians."

the Gaza Strip, such as Operation Cast lead in 2008–2009. These incidents give rise to the question of whether the State should be held liable in torts for injuries sustained by Palestinians due to IDF activities in the OPT, and if so, under which circumstances—a question which provokes turbulent political debate given its charged background. This question arose in full force following the events of the First Intifada, which erupted in late 1987.⁶ As a result of Palestinians' injuries in the events of the First Intifada, many lawsuits were filed with Israel's national courts by plaintiffs claiming that the State was liable for their injuries ("the First Intifada Claims").

In principle, Israeli tort law enables tort claims against the State for any wrongful act that its agents have committed, including IDF soldiers.⁷ This liability rule is established in the Civil Wrongs (Liability of the State) Law ("the Act").⁸ Therefore, Palestinian victims of said confrontations were able to bring claims before Israeli civil courts.⁹ This, of course, raised questions concerning choice of law in the OPT, *i.e.* whether these lawsuits should be adjudicated according to Israeli tort law. Due to the special status of the OPT, the policy of the Israeli government and judiciary was to allow such

⁶ For a review of these events and their legal impact, see HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 1 (2006) (Isr.) (in Hebrew).

⁷ Initially, the Civil Wrongs Law did not include an explicit provision that tied State liability to that of its agents. This created interpretive difficulties for the courts, and therefore, the Civil Wrongs Law was amended in 1985 (Amendment No. 3) to provide that when the State is immune from suit, so are its agents, and vice versa. See Israel Gilead, *Tort Liability of Public Authorities and Public Officials (Parts I and II)*, 2 MISHPAT U'MIMSHAL 339 (1994) (in Hebrew).

⁸ Civil Wrongs (Liability of the State) Law, 5712–1952, § 3, 1 (as amended) (Isr.) [hereinafter "Civil Tort Act"], <https://www.adalah.org/uploads/oldfiles/features/compensation/law-e.pdf> [<https://perma.cc/4LEY-HK82>] (unofficial translation) ("The State is not civilly liable for an act done within the scope of lawful authority, or *bona fide* in the purported exercise of lawful authority; but it is liable for negligence in connection with such an act.").

⁹ Israeli trial courts are divided into two levels: Magistrate Courts, which in civil cases have jurisdiction over matters up to two and a half million (2,500,000) New Israeli Shekel ("NIS") (approximately six hundred and fifty thousand (650,000) U.S. Dollars); and District Courts, which in civil cases have jurisdiction over cases in which more than two and a half million (2,500,000) NIS are in dispute. The district courts also hear appeals of judgments of the magistrate courts. In the context of this Article, both instances adjudicate cases of Palestinians' tort claims against Israel, according to an estimated amount of damages assessed by plaintiffs.

claims without bars of jurisdiction, justiciability, and standing.¹⁰

However, the Act lays down another hurdle in the path of Palestinians seeking remedy. According to the Act, "[t]he State is not civilly liable for an act done in the course of a *combat action* of the Israel Defense Forces."¹¹ The legal meaning of this immunity is that only in cases in which the action conducted by the IDF *did not* constitute a "Combat Action" should courts examine the validity of the claim based on the State's fault.¹²

The First Intifada Claims gave rise to the question of how to correctly interpret the term "Combat Action." According to Jacob, because the original version of the Act did not include a definition for the term, Israeli trial courts interpreted it to the best of their understanding.¹³ Jacob labeled the courts' interpretations of "Combat Action" as either expansive or restrictive. Although both interpretative trends held that Israeli authorities' actions during the First Intifada could be protected by sovereign immunity, the tendency reflected in the expansive trend was to view most of these actions as "Combat Actions," whereas the restrictive trend distinguished between "police work" and "Combat Action," and sought to examine each case separately, according to its circum-

¹⁰ For a detailed review of the issue, see Michael M. Karayanni, *Choice of Law Under Occupation: How Israeli Law came to Serve Palestinian Plaintiffs*, 5 J. PRIV. INT'L L. 1, 4 (2009) (discussing the development of Israeli choice-of-law rules in civil actions filed by Palestinian plaintiffs before Israeli courts when the cause of action was based in the OPT); MICHAEL M. KARAYANNI, *CONFLICTS IN A CONFLICT: A CONFLICT OF LAWS CASE STUDY ON ISRAEL AND THE PALESTINIAN TERRITORIES* (2014) (analyzing legal doctrines instructing Israeli courts for civil suits pertaining to the OPT from 1967 to present). For the history and politics of this policy and its implications on international law, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 19–25 (2002) (discussing events that led to the Israeli Supreme Court's position on jurisdiction, justiciability, and substantive norms concerning the Court's power of review over actions in military areas not part of Israeli sovereign territory).

¹¹ Civil Tort Act, *supra* note 8, § 5 (alteration in original) (emphasis added). This constitutes an exception to the general rule set forth in Section 2, according to which the State will not be treated differently with regard to its liability in torts than any other incorporated entity. See *Id.* § 2 ("For the purpose of civil liability, the State shall, save as hereinafter provided, be regarded as a corporate body.").

¹² Tamar Gidron, *Liability of the State and of Public Authorities in Negligence in Israel – A Slippery Slope*, 51 HA'PRAKLIT L. REV. 443, 454 (2011) (in Hebrew) (explaining that there are instances in which there is actual harm to an individual but she cannot sue because the harm occurred during a military operation).

¹³ Assaf Jacob, *Immunity under Fire: Sovereign Immunity for Damage Caused by Combat Action*, 33 MISHPATIM L. REV. 107, 158–59 (2003) (in Hebrew).

stances. This mixed approach allowed some Palestinian claimants to succeed in receiving remedy for their injuries from the State.¹⁴

Eventually, in *Beni Uda v. The State of Israel* (the “*Beni Uda* case”), this interpretive question reached the doorstep of the Israeli Supreme Court.¹⁵ In the *Beni Uda* case, IDF soldiers shot at Palestinian fugitives, although they were *not* in danger. The issue was whether this constituted “Combat Action.” The Supreme Court held that the term “Combat Action” should be narrowly understood, and it is necessary to distinguish between police-like activities and combatant actions undertaken by the IDF in the OPT. The Court held that the matter should be decided on a case-by-case basis, and when the operation involved high levels of risk to IDF soldiers, actions directed against terrorist organizations could amount to combat actions in certain cases. The *Beni Uda* case was not considered a case of “Combat Action.”

Meanwhile, in September 2000, the events of the Second Intifada began, causing numerous injuries to Palestinians and leading to a high volume of lawsuits against the State.¹⁶ Due to these events and the fact that the Israeli legislature (“Knesset”) was not satisfied with the interpretation given to the term “Combat Action” in the *Beni Uda* case, Amendment (No. 4) was enacted (“the 2002 Amendment”).

Under the 2002 Amendment, a definition was added to the term “Combat Action.” The definition contained actions against terrorist organizations, which “includes any action combating terrorism, hostile acts, or insurrection, and also an action intended to prevent terrorism, hostile acts, or insurrection that is taken in a situation endangering life or limb.”¹⁷ The 2002 Amendment also added new articles which set forth special procedural arrangements for claims arising from IDF actions in the OPT. These in-

¹⁴ See generally *id.* at 159–63.

¹⁵ CA 5964/92 *Beni Uda v. The State of Israel* 56(4) PD 1 (2002) (Isr.) (in Hebrew). The Israeli Supreme Court has two major functions: it serves as an *appellate court*, and as the *High Court of Justice*. In the *Beni Uda* case, the Supreme Court served as an appellate court for the district court’s adjudication of the claim.

¹⁶ For a detailed review of the events of the Second Intifada, see Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, 34 J. PALESTINE STUD. 85 (2005) (discussing military operations, outbreak, losses, Palestinian suicide attacks, and Israeli assassinations during the Second Intifada).

¹⁷ Civil Tort Act, *supra* note 8, § 1.

cluded, for example, shortening the statute of limitations on such tort claims from seven to two years.¹⁸ The 2002 Amendment shifted the focus of the adjudication process to the question of whether the IDF act was performed through a "Combat Action." This Article examines, among other things, the extent to which this shift was successful.

Although the Article is primarily concerned with the 2002 Amendment, additional remarks are in order regarding the developments that followed its enactment. Following the 2002 Amendment, the Israeli government initiated another bill, further limiting state liability for Palestinians' injuries caused by IDF actions. Amendment (No. 7) dealt with claims filed by residents of "conflict zones,"¹⁹ and provided that the State is not liable for any action taken by IDF within such zones, thus excluding claims by most Palestinians residing in the OPT.²⁰ This Amendment was partially invalidated by the HCJ, which held that it disproportionately violated the right of Palestinians to compensation outside the scope of "Combat Action."²¹

Yet, the political process aimed at restricting the State's liability for Palestinians' injuries persisted, and Amendment (No. 8) was

¹⁸ Civil Tort Act, *supra* note 8, § 5A(3) ("The court shall not hear a claim filed more than two years from the day of the act that is the subject of the claim . . ."). Additional important changes included: a requirement to submit a notice of claim within sixty days from the date of the incident, and a change in the standard of proof in these claims. *Id.* §5A(2)(b)–(c). The Amendment stated that rules that shift the burden of proof to the defendant—in cases where the object which caused the injury was dangerous or when there exists factual vagueness with regard to the circumstances which led to the injury—will not apply to the claims in question. See Tort Ordinance (New Version), 5729–1968, §§ 38, 41 (as amended) (Isr.); Civil Tort Act, *supra* note 8, § 5A(4).

¹⁹ Civil Tort Act, *supra* note 8, § 5C(e) ("'Conflict Zone'—a zone outside the territory of the State of Israel, which the Minister of Defense has declared as set forth in subsection (c), in which the security forces acted or were present in the zone within the context of a conflict.").

²⁰ Civil Tort Act, *supra* note 8, § 5C(a) ("Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained in a Conflict Zone due to an act performed by the security forces . . ."). Additionally, Section 5B provided that the State is not liable for injury sustained by an enemy state national, by a person who is an active member of a terrorist organization, or by a person injured while acting as an agent of these entities. *Id.* § 5B(a)(1)–(3). Note, Section 5B was upheld by the Supreme Court in *Adalah v. Government of Israel*. HCJ 8276/05 *Adalah v. Government of Israel* 62(1) PD 1 (2006) (Isr.) (in Hebrew).

²¹ HCJ 8276/05 *Adalah v. Government of Israel* 62(1) PD 1 (2006) (Isr.) (in Hebrew).

enacted in 2012 ("the 2012 Amendment").²² Though the 2012 Amendment pays lip service to the HCJ's judgment, by removing the invalidated article, in effect, it attempts to reverse the ruling, replacing case-by-case analysis with the use of sweeping exemption categories and restating the essence of the 2005 Amendment.²³ It also places additional procedural hurdles for Palestinians victims seeking a remedy.²⁴ Lastly, as of July 2014, Gaza Strip residents are no longer eligible to bring tort claims against Israel, as the Gaza Strip was declared "enemy territory" by the Israeli Prime Minister.²⁵

This brief review of the Act's legislative history calls for the topic addressed in this Article, namely how the relationship between the Knesset and Israel's civil courts is reflected in court decisions in the tort claims in question, specifically focusing on the impact of the 2002 Amendment.²⁶ The Article sheds light on a relatively neglected phenomenon among legal scholars—the politics of judicial decision-making on the trial court level. This Author suggests that the dynamics between the courts and the Knesset have had a deep impact on civil litigation within the Conflict, and are therefore important to explore. Furthermore, the discus-

²² Civil Wrongs (Liability of the State) Law (Amendment No. 8), 5768–2008, (Isr.) [hereinafter "Civil Tort Act (Amendment No. 8)"], http://www.hamoked.org/files/2011/9083_eng.pdf [https://perma.cc/DBG3-3TAN] (unofficial translation).

²³ Ido Rosenzweig & Yuval Shany, *Definition of "Combat Action" in Civil Tort Law (Liability of the State)*, 10 *TERRORISM & DEMOCRACY* (2009), [http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-10-october-2009/definition-of-combat-action-in-civil-tort-law-\(liability-of-the-state\)/](http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-10-october-2009/definition-of-combat-action-in-civil-tort-law-(liability-of-the-state)/) [https://perma.cc/6GVM-XVEW] (analyzing the 2012 Amendment and suggesting it essentially overrides the Court's ruling in the *Adalah* case).

²⁴ Among other changes implemented by the 2012 Amendment, it requires courts to decide on "Combat Action" immunity claims as a preliminary plea; it expands the exemption of Article 5B to apply to residents of enemy territory; and it holds that the assessment of compensation will be conducted according to standards applicable in the place of residence of the plaintiff, thus inherently limiting the prospective amount of damages for Palestinians. Civil Tort Act (Amendment No. 8), *supra* note 22, § 2–4. For more on these restrictions, see Gilat Bachar, *Access Denied – Using Procedure to Restrict Tort Litigation: the Israeli-Palestinian Experience*, 92(3) *CHIC.-KENT L. REV.* (Forthcoming, 2017) (exploring the various barriers Palestinians face in bringing tort claims against the Israeli government).

²⁵ Civil Tort Ordinance (Liability of the State) (Declaration of Enemy Territory – the Gaza Strip), 7431-2014, (Isr.).

²⁶ Since the time frame for the Study stops at 2012, the impact of the 2012 Amendment is beyond the scope of this Study.

sion bears implications for the study of the potential role of monetary awards granted by states as a mechanism for dealing with civilians' injuries,²⁷ which is yet to be fully developed in the context of ethno-national conflicts.²⁸ With this background in mind, the next Section describes the relevant scholarship on legislature-courts dynamics in the United States and in Israel.

²⁷ This issue has been dealt with in various contexts, such as compensation for injuries inflicted by terrorism acts, crime, and war. See Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 418 (2003) (exploring tort compensation surrounding the September 11, 2001 terrorist attacks); Liesbeth Hulst & Arno J. Akkermans, *Can Money Symbolize Acknowledgment? How Victims' Relatives Perceive Monetary Awards for Their Emotional Harm*, 4 PSYCHOL. INJ. & L. 245, 245 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3267030/> [<https://perma.cc/96JC-RXM9>] (comparing tort compensation for emotional harm suffered by close family members of crime or accident victims in different legal systems); Yael Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 183 (2009) (discussing injury or death "as incidental outcomes of military attack" as a result of new military technology and changes in warfare and the role of compensation in addressing such harm to civilians).

²⁸ But there is a rich scholarship in social psychology that deals with the psychological dynamics of ethno-national conflicts, and the Israeli-Palestinian conflict in particular. See Nadim N. Rouhana & Daniel Bar-Tal, *Psychological Dynamics of Intractable Ethnonational Conflicts: The Israeli-Palestinian Case*, 53 AM. PSYCHOLOGIST 761, 761 (1998), https://www.researchgate.net/publication/232522388_Psychological_Dynamics_of_Intractable_Ethnonational_Conflicts_The_Israeli-Palestinian_Case [<https://perma.cc/4UZJ-LFZR>] (arguing that some ethnonational conflicts have characteristics that increase their resistance to change, and that societies in such conflicts form societal beliefs that, on the one hand, help them cope with the stressful conditions of the conflicts but, on the other hand, perpetuate the conflicts); Byron Bland, Brenna Powell & Lee Ross, *Barriers to Dispute Resolution: Reflections on Peacemaking and Relationships Between Adversaries*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 265 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) (discussing psychological barriers to conflict resolution in intergroup conflicts, such as the Israeli-Palestinian Conflict). One question which arises from these works is what can be done to address the societal beliefs acquired by Palestinian and Israeli societies as a result of the Conflict. However, exploring the potential role of monetary compensation in post-conflict reconciliation is beyond the scope of this Research.

3. LEGISLATURE-COURT DYNAMICS AND THE INTERPRETATION OF NEW LEGISLATION

3.1. Congress-Judiciary Relations in the United States – Comparative Observations

The complex relationship between the judicial branch and the legislature in the United States has long been acknowledged, and has been the subject of abundant scholarship. For the purpose of this Article, which cannot encompass this extensive writing, the Author focuses on one key aspect of the literature: potential explanations to courts' interaction with the legislature through statutory interpretation, with a particular eye towards the way in which courts implement a legislative change.²⁹

Over the years, various answers have been given and different research models developed in response to the question of what comprises judges' considerations when deciding disputes. The last several decades have seen a shift from the *legal formalism* of the early 19th century, which believed in the judge's ability to place facts into a mathematical-like formula and calculate the "correct" legal result,³⁰ to the *attitudinal model* first introduced in the 1960s. Ac-

²⁹ By doing so, the Author focuses on models of judicial decision-making that assume rationality among judges, as opposed to another important school of thought for studying judicial decision-making, through cognitive psychology and behavioral theory. According to the latter, judges, as human beings, are susceptible to the distortive, unconscious effects of interrelated cognitive biases and psychological phenomena, which impact their decision-making. See Eyal Zamir & Ilana Ritov, *Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165, 165 (2012) (discussing omission bias as a reason for the actual standard of proof in civil litigation to exceed fifty-one percent, higher than the formal rule of preponderance of evidence); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009), http://scholarship.law.cornell.edu/facpub/786/?utm_source=scholarship.law.cornell.edu%2Ffacpub%2F786&utm_medium=PDF&utm_campaign=PDFCoverPages [https://perma.cc/7ZUQ-SBAS] (asserting that judges harbor implicit biases affecting judgment).

³⁰ See Karen Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 557 (2011) ("The legal model evolved and was refined from the legal formalism of the early 19th century, which viewed legal logic as an inner perfection unto itself, and believed in the judge's ability to place facts into a mathematical-like formula and calculate the 'correct' legal result." (citing

according to the attitudinal model, which developed with the rise of the behaviorist approach to political science and realist legal theories, the law is intended to no more than camouflage justices' genuine considerations and grant legitimacy to their decisions.³¹ Since these early days, though, scholars have tweaked the basic notion of the attitudinal model, creating a more nuanced understanding of judicial decision-making.³²

Attempts to analyze the strategic interactions between courts and legislatures typically use an individualistic approach; that is, an approach which views courts or judges as having an independent political agenda. These studies combine judges' preferences and strategies with extra-judicial influences, to explain the ways in which institutional structures shape judicial policy.³³ From this perspective, Supreme Court justices may certainly have interests independent of those shared by certain social groups. In this context, *rational choice theory* views Supreme Court justices as players who act strategically to advance their policy goals and, in order to minimize the possibility of congressional override, may adjust the Supreme Court's doctrinal positions and may not vote according to

Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997)).

³¹ *Id.* at 558 ("[V]oices began to be heard calling for a new, *neo-institutional approach* to judiciary politics studies. These voices advocated changing the research focus from the policy preferences of particular judges to the characteristics of the court as an institution, its relationship with other political institutions, and how this affects and shapes justices' policy preferences."). See generally WALTER F. MURPHY, CHARLES HERMAN PRITCHETT, LEE EPSTEIN & JACK KNIGHT, *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* (6th ed., 2006) (discussing, inter alia, U.S. judicial decision-making); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (asserting that judges are policy makers who decide often based on personal policy preferences).

³² Weinshall-Margel, *supra* note 30, at 558 ("[A] judge's decision is influenced not only by institutional restrictions and the sense of danger in deciding based solely on his or her priorities, but also by the sense of obligation to act according to the law.").

³³ For reviews of the various studies and approaches which comprise this literature, see Weinshall-Margel, *supra* note 30; Assaf Meydani & Shlomo Mizrahi, *The Relationship Between the Supreme Court and Parliament in Light of the Theory of Moves: The Case of Israel*, 22 RATIONALITY & SOC'Y 55, 62 (2010), http://is.muni.cz/el/1422/jaro2013/MVV2868K/um/MEYDANI_MIZRAHI_-_ISC_vs_Parliament_in_Light_of_the_Theory_of_Moves.pdf [<https://perma.cc/E3DE-Z7KH>] (discussing different studies that analyze Supreme Court behavior from an individualistic or rational choice perspective).

their sincere preferences.³⁴ In contrast, *the neo-institutionalist approach* views judges as interested in preserving their organization's power and authority.³⁵ Eskridge, for example, argues that current legislative expectations are usually more important to the Court than original legislative intent.³⁶ In this context, some scholars suggest viewing judicial activism as a strategic move which attempts to increase the Supreme Court's independence and strengthen the norms derived from its rulings.³⁷

This body of research supports the view that political discourse may well affect judicial decision-making. It gives a sound foundation, both theoretical and empirical, to the fact that the relationship between supreme courts and legislatures is taken into account by both these entities. It also underpins the view of supreme courts as attempting to maintain their institutional independence and stance vis-à-vis legislatures through their decisions while trying to remain within the boundaries of public opinion. However, missing in this

³⁴ See, e.g., William N. Eskridge Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 616–17 (1991), http://digitalcommons.law.yale.edu/fss_papers/3835/?utm_source=digitalcommons.law.yale.edu%2Ffss_papers%2F3835&utm_medium=PDF&utm_campaign=PDFCoverPages [<https://perma.cc/37WQ-AZDR>].

³⁵ See, e.g., Albert Breton, *Organizational Hierarchies and Bureaucracies: An Integrative Essay*, 11 EUR. J. POL. ECON. 411, (1995), <http://www.sciencedirect.com/science/article/pii/017626809500011L> [<https://perma.cc/JRH4-DFNC>] (discussing organizational agency issues within bureaucracies).

³⁶ William N. Eskridge Jr., *Overriding Supreme Court's Statutory Interpretation Decisions*, 101 YALE L.J. 331, 415 (1991), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4816&context=fss_papers [<https://perma.cc/6CVG-MZE7>] (“This study suggests . . . that current legislative expectations are usually more important to the Court than original legislative expectations.”).

³⁷ See Omri Yadlin, *Judicial Discretion and Judicial Activism as a Strategic Game*, 19 BAR-ILAN UNI. L. REV. 665 (2003) (in Hebrew) (comparing judicial activism in the House of Lords in England, the United States Supreme Court and the Israeli Supreme Court). For empirical research testing these theories, see, e.g., Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 295–96 (1996), <http://www.sciencedirect.com/science/article/pii/014481889600018X> [<https://perma.cc/3JWU-DXBT>] (addressing the question of how much discretion judges have interpreting statutes and offering a game theory model directed towards approaching the problem. According to the authors' analysis, judges are constrained by the possibility of legislative reversal of decisions, so the space for judicial discretion expands as overriding the court becomes more difficult); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463, 463 (1992) (developing an econometric model to explore Supreme Court decision-making subject to the constraints of Congress and the president).

scholarship are the trial courts: do they interact in a similar manner with the legislature when deciding politically-charged cases? And if so, what are their motivations? This issue has attracted significantly less attention in the scholarship.³⁸

That is not to say that the analysis of lower courts' decision-making in the context of statutory interpretation has been completely absent from current scholarship.³⁹ The empirical writing in this field occasionally analyzes judicial decision-making in lower state and federal courts, and examines judges' approaches to statutory interpretation.⁴⁰ This literature has also recognized political incentives that drive lower court judges, primarily those related either to judges' partisan loyalty or to the effects of periodic review of judges who stand for reelection.⁴¹ Yet such writing generally does not deal directly with the dialogue between these courts and the legislature as manifested in judicial opinions. Rather, it focuses on statutory interpretation or on sentencing decisions by lower courts, in consideration of their own goals and aspirations or vis-à-vis norms established by the Supreme Court.⁴²

³⁸ Friedman, *supra* note 1, at 265 ("Many of the political science studies focus on the Supreme Court. But if constraint is the issue, all the important action might be in the lower courts.").

³⁹ For work not only looking at the interaction between the three branches with regard to statutory interpretation, but also dedicating some attention to lower courts in this context, see LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (2d ed. 2014).

⁴⁰ An interesting example is the extensive work done on product liability law in a variety of U.S. states. Henderson & Eisenberg used appellate and trial court decisions to show that changes in judicial decision-making are occurring, and that current trends show defendants as the favored parties. Another inference from their research is that the legislature's action in this field was unnecessary, as it has been preempted by a change, which already gradually took place in the judicial approach. See James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability*, 20 *ANGLO-AM. L. REV.* 188, 189 (1991) (explaining how the roots of the judicial lawmaking trend in the products liability sphere began in the early 1980s, after which the legislature sought to rein in defendant-favoring doctrines with post-hoc legislation).

⁴¹ See, e.g., Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103 *AM. ECON. REV.* 1360, 1360 (2013) (studying the influence of election systems on state court judges and their criminal sentencing decisions); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 *AM. J. POL. SCI.* 247, 247-48 (2004) (developing and testing a theory specifying the conditions under which trial judges will alter their sentencing behavior to improve their electoral prospects).

⁴² As for the latter, recently published work had looked at the way lower

When it comes to research that specifically concerns the influence of a legislative *change* on lower courts' decisions, scholars have concentrated on examining the effective outcomes of such alterations in the governing law on the specific topic of interest,⁴³ rather than on judiciary-legislature dynamics reflected in the decisions.⁴⁴ This work nevertheless provides important background for judiciary-legislature dynamics, as it asserts the notion that courts react in their decision-making to legislative attempts to limit their discretion.

One example worth mentioning on statutory interpretation trends in lower courts is a study conducted by James Nehf.⁴⁵ Nehf argues that the current debate over interpretive theory will lose momentum if the focus continues to be solely on theories derived from Supreme Court decisions, since that Court's role is concerned more with constitutional interpretation, and the decision-making process is markedly different in other courts. Nehf's findings show a strong tendency in lower courts of relying on textual sources for statutory interpretation, and suggest that such methods allow for extremely *flexible* interpretations, where courts can justify virtually

courts respond to changes in the Supreme Court's rules of statutory interpretation. See Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 483 (2015) (considering "the relationship between the Supreme Court's methodological practices . . . and the behavior of other courts").

⁴³ See, e.g., Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987-1988) (specifically examining the impact of legislative changes on juvenile courts).

⁴⁴ A rare example can be found in a study on the effects on decision-making when judicial discretion in criminal sentencing is confined. It has been suggested that courts should beware of light sentencing, especially in high-profile cases, as this may provoke Congress to start down the mandatory minimum road, thus confining their discretion. See Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 619 (2006) (analyzing federal sentencing reform in white collar crime cases, and the possibility of imposing mandatory minimums for certain corporate crimes). Despite differences in context and method, the conclusions of this research are important for this Study: a statutory reform aimed at changing courts' case law and affecting their scope of discretion.

⁴⁵ See James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L. J. 1, 3-5 (1994) (arguing that present scholarship regarding interpretive theory focuses on Supreme Court decisions as the principal resource due to two main reasons: first, a premise that such decisions represent the hardest, and therefore most interesting, cases; and second, a bias among academics as a result of their past as Supreme Court clerks).

any decision they desire. These findings reflect reasoning methods used by lower court judges when implementing legislation with which they do not necessarily agree. Nehf's study thus stresses the importance of analyzing lower court decisions in the field of statutory implementation.

3.2. *Knesset-Judiciary Relations in Israel*

This Section briefly outlines the literature on the relations between the judiciary and the political system in Israel against the backdrop of Israel's unique institutional structure.⁴⁶ In Israeli scholarship, much like in U.S. scholarship, the focus in this area had been almost exclusively on the Supreme Court—its status, interests, and interaction with the Knesset. Very few studies have looked at, or even mentioned, lower courts in this context.

For many years, a single majority party controlled the Israeli parliament, and the judiciary was relatively passive. The jurisprudence of these years expresses a belief in strict separation of powers between the Knesset and the courts.⁴⁷ However, since the 1970s, the Israeli Supreme Court has assumed a more active role in criticizing state actions. The Court has increased its involvement in political decisions, and intensified its level of judicial review of statutes.⁴⁸ In developing a rich jurisprudence on political and civil

⁴⁶ See Gad Barzilai, *Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective*, 5 ISR. AFF. 15, 31 (1998) (describing the Israeli Supreme Court in light of Israeli politics and global trends); Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 LAW & SOC'Y REV. 319, 320 (1999) (arguing that evaluating judicial rhetoric and out-of-court practices and procedures can point to conclusions about Israeli institutions).

⁴⁷ MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 75-90 (2011) (arguing that this approach enabled the legal community to maintain and develop the evolving values of Israeli law, which were in tension with, if not contradiction to, some of the central values of the hegemonic culture); see generally SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* (1994) (studying the revolution regarding the role played by the judiciary, particularly the Supreme Court in Israeli society and the system of government).

⁴⁸ This process was largely attributed to the growing impact of liberal values within Israeli political culture, combined with the absence of a written constitution in a highly polarized and fragmented society. Some scholars also connect it to the divided structure of Israeli politics. The deepening social rift and the decrease in the public's regard towards politicians' credibility have led the Court to be considered not only the most reliable institution in the country, but also the on-

rights, the Court has intervened in socio-political and governmental policies.⁴⁹ In most cases, the Knesset chose not to exercise its formal authority and accepted the Court's rulings, thereby increasing the Supreme Court's power at the expense of the Knesset's status.⁵⁰ This process has turned the Supreme Court into one of the most significant and powerful players in politics and society in Israel.⁵¹

One key question in this scholarship is what drives the Court in resolving disputes that are intimately related to political issues. Three main emphases in the Court's motives can be identified in the scholarship: social values and partisan-structural factors;⁵² re-

ly institution capable of addressing social and political conflicts. One way in which the Court went about widening its role in Israeli society was by interpreting legal terms such as "standing" and "justiciability" in a broad fashion, thus allowing it to take an active part in all walks of social and political life in Israel. See MAUTNER, *supra* note 47, at 90-145 (recounting historical events that led to the Court's role in Israeli society). See also Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONS. L. 118, 118 (2009) (assessing the developments and doctrinal changes that led to the expansion of judicial review involving the Israeli Supreme Court); Barzilai, *supra* note 46, at 18 (describing how the active judicial review in Israel might mean the State is better defined as a "judicial-administrative regime.").

⁴⁹ See Yoav Dotan, *Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice*, 33 LAW & SOC'Y REV. 1059, 1064 (1999) (describing how the Court has developed rich jurisprudence in political rights and intervened in governmental policies on many occasions).

⁵⁰ See ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS* 3 (2011) (explaining how the relationship between the Court and the parliament was transformed, leading to a change regarding the "who governs?" rule). See also EDELMAN, *infra* note 60, at 12 (suggesting that the fact that courts impose only the most basic, most widely accepted values of natural justice precludes the Knesset's reversal).

⁵¹ See Barzilai, *supra* note 46, at 19-20 (theorizing that the increased judicial activism of the Court is due in part to increased public reliance as a result of lack of confidence in the political institutions). However, this process has also invoked much controversy. A key critique, made by Ruth Gavison, suggests that in rifted democracies such as Israel, courts should be reluctant to intervene in political priorities, especially in areas of social controversy. According to Gavison, such determinations should be left to the political branches, while the courts should concentrate on defending individuals against the clear violation of basic rights and the conditions necessary for effective democracy. Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 227 (1999). Gavison's view has gained traction in Israeli politics in recent years.

⁵² See, e.g., Barzilai, *supra* note 46, at 25 (stating partisan, self-interested institutions as adding to a sense of legitimacy). In contrast to the U.S. system, Israel has a parliamentary system with relatively strong party control over its members, which in turn affects the relationship between the Knesset and the courts.

lations and interests among the ruling elite;⁵³ and cultural factors.⁵⁴ Some scholars have stressed the Court's interests in preserving its judicial independence and its institutional stance against the legislature, as is seen in U.S. literature.⁵⁵ Along the same lines, other scholars suggest that the Court's intervention in political issues is a means of establishing judges as "experts" who determine the extent to which a certain political decision is reasonable.⁵⁶ Both these views represent the abovementioned individualistic approach. A different view is posited by Mautner, who contends that the Court has been a channel for specific groups in Israeli society to advance their liberal values over those held by other sectors.⁵⁷ Indeed, the literature provides various explanations to the behavior of the Court in its relationship with the Knesset and different answers as to whether the Court is only interested in protecting its institutional status, or also seeks to promote a value-based agenda that might clash with the goals of the legislature. However, this scholarship

⁵³ See, e.g., EVA ETZIONI-HALEVY, *A PLACE AT THE TOP: ELITES AND ELITISM IN ISRAEL* (1997).

⁵⁴ See, e.g., MAUTNER, *supra* note 47, at 79–80 (arguing that "throughout Israel's six decades of statehood," cultural paradigms regarding issues like human rights have influenced the Court's promotion of a more liberal system). This, of course, is merely a rough distinction since some of the works in this field, such as Mautner's, combine different types of factors which influence judiciary-Knesset relations.

⁵⁵ See Barzilai, *supra* note 46, at 28 (discussing how the Israeli Supreme Court began exercising a supervisory function over Knesset legislation and nullify laws not aligned with Israel's status as a democratic and Jewish state); see also PATRICIA J. WOODS, *JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICT IN ISRAEL* 8 (2008) (alteration in original) ("[W]hen courts challenge other state institutions, and particularly when they challenge administrative power in favor of individual rights, they may experience the most dramatic gains in judicial power. When courts increase judicial power in this way, they may be demonstrating a substantively new type of judicial independence associated with high degrees of judicial power.").

⁵⁶ Ronen Shamir, *The Politics of Reasonability: Discretion as Judicial Power*, 5 *THEORY & CRITICISM* 7 (1994) (in Hebrew) (discussing the increasing involvement of the Israeli Supreme Court in public life).

⁵⁷ See MAUTNER, *supra* note 47, at 75 (arguing that a significant shift in the Court's jurisprudence was "the shift from the Court's view of itself as a professional institution whose role is to settle disputes, to a view of itself as a political institution that participates in determining the values that prevail in the country and the distribution of its material resources"); see also Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, in *LAW IN MANY SOCIETIES* 31–33 (Lawrence M. Friedman, Rogelio Pérez-Perdomo & Manuel A. Gómez eds., 2011) (suggesting an analysis that factors in media portrayal of Court decisions within the context of endorsing specific ideologies).

almost entirely ignores Israel's lower courts, which deal with politically-charged controversies on a daily basis.

Nevertheless, the dominant focus on the fundamental features of the dynamic between the Court and the Knesset may assist our study of lower courts. The important role of the Court in Israeli society establishes the backdrop against which the judicial and the legislative branches interact. More specifically, given the influence of the Court on the legal system as a whole, which stems in large part from Israel's common law tradition and the role of precedents, the described dynamic may affect the relationship between trial courts and Knesset as well, when applying the necessary changes. Building on these foundations, this Article seeks to expand the current literature by empirically examining the role trial courts assume in adjudicating socially and politically complex cases.

This Article is especially concerned with trial judges' responses to a legislative change aimed at limiting their discretion. In this sense, the analysis of judiciary-Knesset relations in Israel builds on research examining the effect of changes in legislation on the judicial approach to statute interpretation.⁵⁸ In this context, Levinson-Zamir addressed the implications of the enactment of Basic Law: Human Dignity and Liberty, which includes the protection of the right to property, on courts' interpretation of expropriation statutes. Since prior to the enactment of the Basic Law the right to property was already acknowledged as constitutional, Levinson-Zamir did not expect to find a significant change following the Basic Law's promulgation. However, she found the new legislation actually had a profound effect on judges' approach to expropriation cases, particularly on district court judges.⁵⁹ Although her analysis is mostly doctrinal, and the evidentiary support is anecdotal, her study points to the potential psychological influence a change in the governing legislation may have on judicial decision-making, especially at the lower levels.

⁵⁸ For background on this issue, see generally ASSAF MEYDANI & SHLOMO MIZRAHI, *PUBLIC POLICY – BETWEEN SOCIETY AND LAW* (2006) (in Hebrew).

⁵⁹ Daphna Lewinsohn-Zamir, *Constitutional Protection of Property in Land and the Law of Expropriation*, in *ESSAYS IN HONOUR OF JOSHUA WEISMAN* 375 (2002) (in Hebrew); see also Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 *STAN. J. INT'L L.* 39, 41 (1991) (reviewing methods used by the Court to implement a new policy for reviewing exercise of emergency powers by Israeli security authorities).

3.3. *The Missing Piece: The Rest of the Court System*

Current scholarship has established the existence of an ongoing conversation between supreme courts and legislatures both in the United States and in Israel. This research has used the back and forth dialogue between these entities about legislation as evidence of power dynamics and has emphasized the Supreme Court's interests, either in maintaining its judicial independence and power vis-à-vis the legislature, or in promoting social values.

The relative lack of attention given to lower courts' interaction with legislatures raises the question: Are these courts worth studying? And if so, why? Several intertwined considerations make lower courts an important area for research in this context. First, the high volume of cases they handle as well as the serious practical consequences of their decisions for the parties involved—especially in volatile contexts like the one discussed here—turn them into important actors in the political space surrounding the disputes. In the context discussed here, the core of the legal activity is done at the trial court level, whereas only few cases make it to the Supreme Court on appeal. Second, lower courts often possess a variety of legal tools for statutory interpretation, which allow them to use their discretion in flexible, diverse ways. The use of these methods is particularly intriguing when it comes to navigating politically-charged cases. For all these reasons, this Study chooses to focus on these courts.

One of the few references to the civil court system as a whole in the literature on judiciary-legislature relations in Israel can be found in the work of Edelman. Edelman contends that the system has undergone a process similar to that of the Supreme Court, gradually accumulating authority and considerable political power.⁶⁰ This statement calls for empirical examination that asks whether these courts have indeed taken a path similar to the Supreme Court's in addressing politically-charged disputes, and if so, were they driven by the aspiration to protect their judicial independence vis-à-vis the Knesset, or were other interests involved?

⁶⁰ MARTIN EDELMAN, COURTS, POLITICS AND CULTURE IN ISRAEL 44–47 (1994) (arguing civil courts have come to be seen as objective, fair institutions “by emphasizing the rights of citizens and other residents who have come into conflict with governmental agencies,” thereby playing an increasingly important role in Israeli society).

These questions remain unanswered by the current literature. This Article contributes to closing this gap by examining the case of tort lawsuits brought by Palestinians against Israel. The Article strives to better explain the behavior of trial court judges, arguing they should be viewed as political players holding an institutional agenda vis-à-vis the Knesset. By so doing, the Article offers new insights on judiciary-legislature relations in Israel.

4. QUANTITATIVE ASPECTS OF PALESTINIANS' TORT CLAIMS AGAINST ISRAEL

"The court does not engage in the political aspects of the Intifada . . . the role of the court is to deal with a specific set of facts brought before it in the case in question and with the extent to which this set of facts establishes or does not establish liability."

Abu-Shmalla v. The State of Israel⁶¹

"The courts are thrown into this political commotion and are not sure how to swallow the beast."

Advocate Abu-Hussein⁶²

This Study is aimed at examining the impact of the 2002 Amendment on Israeli trial courts' case law, and the political power dynamics reflected in that case law. The 2002 Amendment changed the Act in two main ways. *First*, the Amendment defined the term "Combat Action," which significantly expanded the scope of sovereign immunity, thus restricting the State's liability for injuries caused by IDF actions. Importantly, the immunity provided by the Act means that only where IDF action *did not* constitute "Combat Action" should the courts examine the validity of the claim on the merits. *Second*, the Amendment shortened the limitations period on tort claims filed on the grounds of IDF actions from seven to two years.⁶³

The Study analyzed court decisions— $N=245$, where N is the

⁶¹ CC (TA) 69946/93 Abu-Shmalla v. The State of Israel (1999) (Isr.) (finding for plaintiff).

⁶² Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012).

⁶³ Other procedural changes were implemented in the 2002 Amendment, including on burden of proof issues. See *supra* Section 2, Civil Tort Act, notes 8, 18.

number of court decisions analyzed—rendered by district and magistrate courts between 1992 and 2012—ten years before and after the 2002 Amendment—in tort claims filed by Palestinians against Israel due to IDF actions in the OPT. While the first decade saw courts ruling for plaintiffs in 39% of the cases, over the second decade this figure dropped to only 17%. In the same vein, whereas before 2002 only one decision rested solely on statute of limitations and no cases were dismissed exclusively due to sovereign immunity, these rationales became dramatically more prevalent after 2002. This seemingly supports the conclusion that Israeli trial courts have been heavily influenced by the 2002 Amendment, which in turn was inspired by the escalation of the Conflict.⁶⁴

However, the data gathered in this Study allowed for a deeper look into the adjudication process. This inquiry revealed surprising patterns in the pro-State versus pro-plaintiff framework, which sometimes pulled in different directions. It revealed the courts' insistence on delving into the details of IDF conduct, adjudicating the claims on the merits, and defying the attempt to confine their discretion to issues of immunity and statute of limitations. One way this was expressed was by courts maintaining the tradition of comprehensive decisions that delve into specific circumstances and preserving "pockets" of judicial discretion, such as a lenient approach towards plaintiffs in costs orders.

Thus, at least until 2012,⁶⁵ a considerable amount of discretion still existed for courts adjudicating the claims, allowing more scrutiny of IDF actions that result in Palestinian injuries than the legislature contemplated. Whether these trends are a sign of a judiciary merely protecting its stance vis-à-vis the Knesset's attempts to limit its discretion, or rather an endeavor to preserve judicial independence in order to act as the State's "conscience" in certain cases, is hard to say. Nonetheless, the data clearly show that when examining the judicial opinions as a whole, rather than only the outcomes

⁶⁴ The Study does not control for other political and military events which occurred in the examined period. Therefore, it may be argued that some of these findings reflect the escalation of the Conflict rather than the legislative change. Yet, the 2002 Amendment and the status of the Conflict are in many ways two sides to the same coin—a legislative process which reacted to historical and political circumstances—and are therefore inseparable. Changes in judicial decision-making trends did occur following the 2002 Amendment, however, and it may be reasonable to attribute them in large part to the Amendment itself.

⁶⁵ See discussion *infra* on later trends in Section 6.

of the cases, a strong trend of courts attempting to preserve their judicial discretion is revealed. The next Sections explore and analyze these findings.

4.1. General Observations regarding the Cases and the Outcomes

"[T]his is an unfortunate outcome and one can easily understand the pain experienced by the family of the deceased, yet the test is not based on outcome but on action."

Hamarsha v. The State of Israel⁶⁶

Several prominent observations emerged from examining the cases and their outcomes. The data revealed a substantial rise in the number of cases after the 2002 Amendment, as well as an increase in the prevalence of substantial and severe injuries. The percentage of cases decided in favor of plaintiffs, however, significantly dropped during that decade.

As Table 1 shows, the population consisted of far more "after" than "before" cases. Although one could imagine a scenario in which the Amendment itself led to such a rise in the number of cases,⁶⁷ this trend actually appears to be the result of external circumstances: an increase in the number of Palestinian casualties and instances of property damages as a result of IDF activity in the decade between 2002 and 2012.⁶⁸ This surge of injuries has led to numerous claims, which naturally yielded more decisions.⁶⁹ How-

⁶⁶ CC (Jerusalem) 11103/04 Hamarsha v. The State of Israel (2011) (Isr.) (finding for the State).

⁶⁷ For example, publicity that made Palestinians more conscious of their right to seek a remedy for their losses. Adv. Hleihil mentioned she believes that such a process has taken place in the last decade, and this might explain some of the differences in claim volume. Interview with Adv. Gada Hleihil (Jan. 12, 2013).

⁶⁸ See generally Esposito, *supra* note 16, at 97–103 (using studies conducted between 2000 and 2004 to analyze the impact of the Al-Aqsa intifada on the Israeli public); David A. Jaeger & M. Daniele Paserman, *The Cycle of Violence? An Empirical Analysis of Fatalities in the Palestinian-Israeli Conflict*, 98 AM. ECON. REV. 1591, 1591 (2008) (using empirical data to examine "whether violence against Israelis and Palestinians affects the incidence and intensity of each side's reaction"); B'Tselem: Isr. Info. Ctr. Human Rights Occupied Terr., Statistics, <http://www.btselem.org/statistics> [<https://perma.cc/5NR9-RU7M>] (last visited Nov. 8, 2016) (containing statistics regarding fatalities and casualties from First Intifada to present).

⁶⁹ According to information provided by "Yesh Din," which pertains to the

ever, a rise in the availability of decisions in recent years, due to improvement in the data collection methods of commercial databases, may also account for part of the difference.⁷⁰

Table 1: Distribution of Cases by Instance and Timing

Timing Instance	1992-2002 (Before Amen.)	2002-2012 (After Amen.)	Total
Magistrate (Published)	21	118	139
District (Published)	38	68	106
Total	59	186	245

An important pattern was identified on the severity of damages sustained by plaintiffs before and after the Amendment. The Study pointed to a statistically significant correlation between the severity of damages and the Amendment ($p=.04$).⁷¹ That is, as Figure 1 indicates, there were significantly more cases of substantial and severe injuries after the Amendment compared to cases of minimal injuries. This finding can be explained primarily by the various military operations that occurred in the OPT after 2002, which used more harmful weapons than those used in prior confrontations between IDF and Palestinians.⁷²

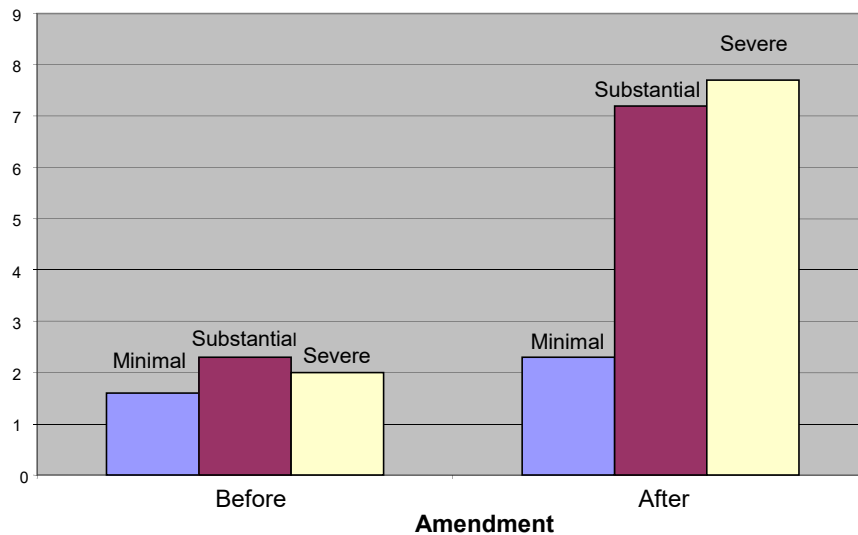
years 2004-2008, a total of 5,282 claims were initiated either as lawsuits filed with Israeli courts or as appeals to the Israeli Ministry of Defense (on file with author).

⁷⁰ E-mails from Yafit Hannan, Database Rep., Nevo, to author (Oct. 28, 2012 to Jan. 26, 2013) (on file with author).

⁷¹ Note the total number of decisions which contained data on this variable was 231 ($N=231$).

⁷² See CC (Jerusalem) 11103/04 Hamarsha v. The State of Israel (2011) (Isr.) (finding for the State); see also Sergio Catignani, *The Strategic Impasse in Low-Intensity Conflicts: The Gap Between Israeli Counter-Insurgency Strategy and Tactics During the Al-Aqsa Intifada*, 28 J. STRATEGIC STUD. 57, 58 (2005) (alteration in original) (describing how "tactics, weaponry[,] and training adopted" by Israel have been extensive and tactically successful); Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012).

Figure 1: Severity of Injuries and the Amendment



A key finding was the striking decrease in the percentage of cases in which courts found for plaintiffs following the Amendment. Before the Amendment the overall percentage of cases decided in favor of plaintiffs was 39%. After the Amendment, those cases amount to only 17% ($p < .001$).⁷³ This finding seems to affirm the Amendment's impact on the outcomes of cases, yet, as noted, it may also be attributed to the political climate generated by the escalation of the Conflict since the early 2000s, the same climate that led to the Amendment itself.

The Study also examined the relationship between case outcomes and various characteristics of the claims. One important variable associated with outcome was plaintiffs' involvement in the events which resulted in their injury, for instance by throwing stones at IDF soldiers. While it was significantly more likely for uninvolved plaintiffs to receive favorable outcomes before the Amendment than after the Amendment ($p = .04$), it was still far

⁷³ An alternative explanation for this finding would be that the decline in the number of decisions in favor of plaintiffs is connected to the rise in the number of claims filed. That is, the population of cases may have included more "weak" cases after the Amendment. However, this does not plausibly explain the whole trend.

more plausible for such “innocent” plaintiffs to win after the Amendment, compared with other types of plaintiffs, i.e., involved or whose involvement was undetermined. Put more numerically, in 77% of the cases in which courts found for plaintiffs after the Amendment, the plaintiffs were uninvolved.⁷⁴

The data also demonstrated the detrimental effect on outcome when plaintiffs participated in the hostilities, particularly after the Amendment. Before the Amendment, 30% of cases were favorable to plaintiffs when there was some level of plaintiff involvement in the events leading to the injury. After the Amendment, this figure dropped to only 10%.⁷⁵

4.2. *The Reasoning of the Decisions*

“There are many ways to dismiss a lawsuit.”

Abu Asbi v. The State of Israel⁷⁶

This brings us to one of the key goals of the research: trying to tease out the extent to which and the ways in which courts’ reasoning has changed following the 2002 Amendment. As expected, the Study did find several changes in the salient components of the reasoning after the Amendment but some of the more interesting findings pertained to aspects which remained unchanged.

First, one striking finding was the use of the statute of limitations as a primary consideration for dismissing a claim. As mentioned, one of the changes implemented by the Amendment was shortening the limitations period from seven to two years.⁷⁷ This change proved to be influential on trial courts’ reasoning. Whereas

⁷⁴ Similarly, in 61% of the cases in which courts found for plaintiffs before the Amendment, the plaintiffs were uninvolved bystanders.

⁷⁵ This included both plaintiffs who were involved in the hostilities, and those who were found to have contributory negligence. In this context, as next elaborated, there were also more cases applying the flexible concept of contributory negligence—which can be set at any percentage of the responsibility for the harm—before the Amendment. See *infra* Section 5.

⁷⁶ CC (Jerusalem) 11524/04 Abu Asbi v. The State of Israel (2009) (Isr.) (finding for the State based on laches, the plaintiff’s failure to meet the burden of proof, lack of IDF negligence, and by virtue of sovereign immunity).

⁷⁷ As noted, plaintiffs were also required by the Amendment to give notice regarding their claim within sixty days of the event or else lose their right to claim their losses. Civil Tort Act, *supra* notes 8, 18.

before the Amendment only one case, which represented 2%, was dismissed solely due to the statute of limitations, after the Amendment, 16% of the dismissed cases rested on this consideration.⁷⁸

Second, a statistically significant correlation was found between the Amendment and the courts' tendency to discuss sovereign immunity ($R=.217$; $p<.001$).⁷⁹ That is, after the Amendment the State was more inclined than before the Amendment to raise the issue of sovereign immunity. Therefore, courts discussed this issue more often in their reasoning. This finding in itself is perhaps not surprising, as the Amendment must have prompted government lawyers to use immunity as a preliminary plea.⁸⁰ However, after the Amendment, the percentage of cases in which courts' reasoning rested solely on sovereign immunity still accounted for only 9% of cases favorable to the State. This relatively low volume of cases may indicate that courts were not willing to withdraw from their traditional role of examining claims on the merits so easily, and pushed back against the Knesset's attempt to limit their discretion to the immunity issue.⁸¹

Finally, another finding lies in an area that had not seen a significant change after the Amendment was passed. This relates to courts' inclination to conduct lengthy factual discussions as part of the reasoning, which remained almost constant before and after

⁷⁸ Distributed by instance, cases dismissed based on the statute of limitations constituted 18% of the dismissed cases after the Amendment at magistrate courts, in contrast to 13% at district courts. This contradicted interviewees' impression that magistrate court judges do not tend to dismiss a case without examining it on the merits, unlike district court judges. Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012); Interview with Adv. Gada Hleihil (Jan. 12, 2013).

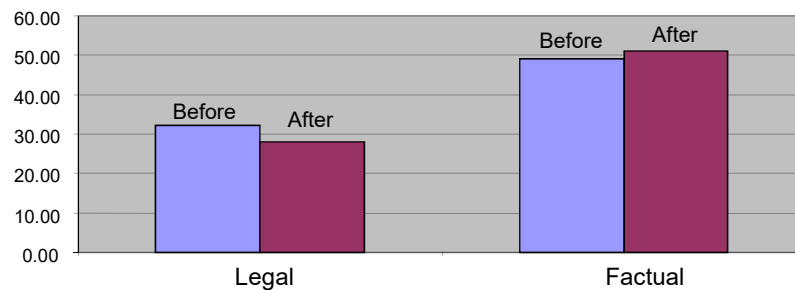
⁷⁹ Discussion of sovereign immunity was coded on a five step scale: (1) Invoked-applied lengthily, *i.e.*, over two pages; (2) Invoked-applied briefly, *i.e.*, less than two pages; (3) Invoked-not applied, *i.e.*, State argued for immunity but the issue went unmentioned in the reasoning or the court did not rule on this point; (4) Invoked-rejected, *i.e.*, State argued for immunity but argument was rejected; and (5) Not invoked, *i.e.*, the issue was not mentioned in the decision. In the analysis, the first two categories were collapsed, then correlation was tested between the combined variable—Invoked-applied—and the Amendment.

⁸⁰ Alternatively, this finding might be explained by the increase in combatant military actions in the last decade.

⁸¹ Because of small numbers, it is impossible to determine the variables correlated with courts' focus on sovereign immunity in these particular cases. However, these cases will be revisited below to qualitatively tease out their similarities. See *infra* Section 5. Many of these cases seem to share the distinct feature of extensive military operations.

the Amendment. Similarly, the tendency of courts to engage in comprehensive legal discussions with regard to the state's liability persisted after the Amendment.⁸² In this sense, it appears that the courts did not fully yield to the Amendment, which aimed to narrow their discretion to statute of limitations and "Combat Action" immunity, rather than the cases' merits. Courts continued to pay close attention in a considerable number of cases to substantive aspects of the case—factual and legal.

Figure 2: Comprehensive Factual/Legal Reasoning and the Amendment



4.3. Litigation Costs

"Under the circumstances, it seems unjust and unfit to order the plaintiff to pay litigation costs."

Amin v. The State of Israel⁸³

"One can only regret the death of the deceased, but this does not justify imposing liability. . . . [C]onsidering the grim results of the case, there is no order for costs."

Abu Hatla v. The State of Israel⁸⁴

⁸² *Infra* Figure 2.

⁸³ CC (Jerusalem) 15600/01 Amin v. The State of Israel (2006) (Isr.) (finding for the State).

⁸⁴ CC (Haifa) 14685/94 Abu Hatla v. The State of Israel (2004) (Isr.) (finding for the State).

Another element in the content of the decisions, which points to a more complex judicial approach than expressed by the outcomes, is orders for litigation costs. Israeli courts follow the English law, according to which successful parties to litigation are entitled to seek an order that unsuccessful parties pay their litigation expenses. However, the judge has considerable discretion in applying this rule.⁸⁵ Therefore, this element was assumed to be important in assessing judges' attitudes towards the litigants, as a sort of window into the mind of judges.

First, the Study revealed a striking disparity between courts' approaches towards the parties with regard to costs orders, *regardless of the Amendment*. In the overall pool of cases, while courts rarely avoided giving an order for costs when the State lost—representing only 7% of the cases—there was no order for costs in 42% of the cases in which plaintiffs lost.⁸⁶ This finding supports the argument that courts use costs orders as a means to express a more lenient approach towards plaintiffs, in cases in which they feel compelled to find for the State due to the legal framework.

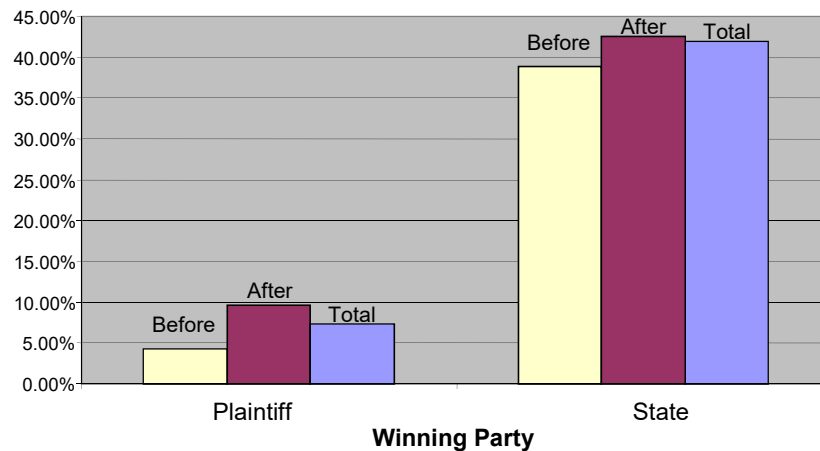
But even more striking is the fact that this disparity was not associated with the Amendment: the inclination not to render an order for costs when plaintiffs lose existed before the Amendment and persisted after it was passed.⁸⁷ The fact that judges remained generally lenient towards plaintiffs in deciding costs orders after the Amendment may point to their reluctance to give in to the anti-plaintiff approach embodied by the 2002 Amendment.

⁸⁵ See KARAYANNI, *supra* note 10, at 231–32 (footnote omitted) (“Under Israeli law, the prevailing party in a civil action is entitled to receive compensation for its litigation expenses from the losing party. In this respect, the trial court has broad discretion in determining the actual sum of compensation to be levied on the losing party and can certainly take into consideration whether the prevailing party was also responsible for unnecessary litigation.”).

⁸⁶ See *infra* Figure 3 (showing decisions without order for costs by winning party before and after the Amendment, and in total).

⁸⁷ See *infra* Figure 3.

Figure 3: Decisions *without* an Order for Costs by Winning Party and Amendment



4.4. *Ex-gratia* Compensation

"The law tries to do justice yet law and justice are like two only partially overlapping circles. . . . The State would do right if despite the outcome of this judgment it will find a way to compensate the plaintiffs as a tribute of ex-gratia."

Husun v. Ministry of Defense⁸⁸

Another way to suggest insight into judges' attitudes towards the claims was through the intriguing phenomenon of *ex-gratia* compensation. That is, courts' recommendation to the State to compensate plaintiffs in the absence of liability and without any admission of fault on the part of the State. The assumption was that such a recommendation, with regard to which courts enjoy full discretion, might reflect their discomfort with the outcome or an attempt to reprimand the State for its actions. However, trends in the Study were ambiguous.

In the overall pool of cases, both before and after the Amend-

⁸⁸ CC (Acre) 3055/97 Husun v. Ministry of Defense (2001) (Isr.) (finding for the State).

ment was passed, the *ex-gratia* recommendation appeared in 7% of the dismissed cases. Although not statistically significant,⁸⁹ these cases shared several characteristics: in 86% of them the plaintiffs suffered bodily harm, and in 93% the damages were either substantial or severe. Additionally, in 86% of the cases plaintiffs were innocent bystanders.

Surprisingly, though, whereas before the Amendment courts recommended *ex-gratia* compensation in 25% of the dismissed cases, after the Amendment this recommendation was given in only 3%. This runs contrary to the expectation that this tool would become more meaningful after the Amendment. While at first glance this finding confirms the pro-State approach manifested by the outcomes, there are also alternative explanations. It could be the result of courts' recognition of the ineffectiveness of their suggestions for *ex-gratia* compensation. It might also stem from their understanding of the weaknesses of this mechanism, namely the fact that it allows the State to grant symbolic compensation without acknowledging its wrongdoing. As elaborated in the next Section, the latter view, which sees this mechanism as inappropriate, was expressed by several judges.⁹⁰

The analysis of the decisions thus portrays a complex picture of the way courts approach the claims. The comprehensive case law analysis identified several interesting findings, the most puzzling of which relates to a disparity between two contradicting patterns: on the one hand, a sharp decrease in decisions in favor of plaintiffs after the Amendment, accompanied by more extensive use of the statute of limitations and sovereign immunity; on the other hand, a consistency in comprehensive factual and legal discussions; limited use of sovereign immunity as a sole consideration to dismiss claims; and a benevolent approach towards plaintiffs in costs orders.

The complexity of the findings, this Author argues, points to trial courts' attempt to preserve their judicial discretion in the wake of the Amendment, in areas in which they still enjoy considerable

⁸⁹ The fourteen (14) cases were too small of a number to allow for statistical analysis. However, this phenomenon will be revisited in the next Section, to examine the language used by the courts in this context, and the impression of interviewees regarding *ex-gratia* compensation. See *infra* Section 5.1.1.

⁹⁰ See *infra* Section 5. Such an approach was expressed, for example, in CC (Haifa) 21738/01 Elmalaha v. The State of Israel (2005) (Isr.).

latitude. However, these findings also raise questions that are not fully answered by the quantitative analysis. Understanding how courts go about the process of maintaining their discretion required further investigation by delving into the rhetoric and specific circumstances of the opinions. The next Section is thus designed to complement the quantitative analysis and to offer further insight into the findings presented in this Section.

5. BEYOND THE NUMBERS: A QUALITATIVE LOOK INTO THE DECISIONS

In order to provide an account of *how* courts went about maintaining their judicial discretion, this Section conducts a qualitative investigation of the decisions, focusing on areas of judicial decision-making in which courts still have a say after the Amendment. For this purpose, the Study identified several recurrent themes that reflect “pockets” of discretion in court decisions: interpretation of the term “Combat Action” and the weight given to sovereign immunity after the Amendment; use of costs orders and *ex-gratia* compensation; and implications of plaintiffs’ involvement in the events that led to their injuries. While these themes pull in different directions on the pro-State versus pro-plaintiff continuum, they share an important feature: They enable courts to determine how to decide the claims, instead of yielding to the Knesset’s dictation. Since the law does not provide a clear legal framework with regard to these issues, further investigation is required to assert the way in which these tools were applied. As detailed below, the findings discovered in the examination generally support patterns revealed in the previous Section.

5.1. *The Core: Interpretation and Implementation of Sovereign Immunity*

5.1.1. *Interpretation of the Term “Combat Action” After the Amendment*

For some time after the 2002 Amendment was enacted, courts struggled with the interpretation of the new definition to the term “Combat Action.” In this context, it is important to look at the “in-

intermediate cases"; that is, cases ($N=60$) in which the claim was filed *before* the Amendment came into force, but the decision was rendered *after* it took effect. Since the Amendment did not explicitly provide a commencement date for the definition of "Combat Action," the question of whether to apply it to these cases was left to courts' discretion. This resulted in courts providing varied interpretations of the legal framework that applies to such claims. The language used in these opinions is telling as to judges' willingness (or reluctance) to accept the implications of the Amendment—and more importantly their insistence on maintaining their discretion.

The most surprising and important finding was the fact that in over half of the intermediate cases, which represent thirty-two cases, courts chose *not to mention* the 2002 Amendment, i.e., they either adjudicated the case based on precedents which interpreted the term "Combat Action,"⁹¹ or decided it without referring to the issue of sovereign immunity.⁹² Furthermore, in eight additional cases, courts specifically referred to the Amendment but stated that it does not control the case, since the event in question took place before the Amendment was enacted.⁹³ This means that in two-thirds of the intermediate cases courts did not apply the newly enacted Amendment to the case before them.⁹⁴

In contrast, in only fourteen cases courts specifically referred to the application of the Amendment. Even then, this was done for

⁹¹ See, e.g., CA 5964/92 Beni Uda v. The State of Israel 56(4) PD 1 (2002) (Isr.) (in Hebrew) (deciding the interpretation of "Combat Action" prior to Amendment).

⁹² In five (5) additional cases, which were not included in the thirty-two (32) cases mentioned, the courts ruled based on the statute of limitations and did not refer to sovereign immunity.

⁹³ However, in one of these cases the Jerusalem Magistrate Court held that although the 2002 Amendment did not apply to the case in question, it did reflect the original legislative intent regarding the term "Combat Action" should be interpreted in accordance with the spirit of the Amendment: "To complete the picture it should be noted that the current definition of the term "Combat Action" in the Act is very broad and it considerably limits the number of cases where victims will be entitled to damages from the State. Although this definition does not apply to the case at hand, it might point to the original intent of the legislature with regard to the term 'Combat Action.'" CC (Jerusalem) 15600/01 Amin v. The State of Israel (2006) (Isr.).

⁹⁴ Interestingly, looking only at the cases in which courts ruled for plaintiffs, in all but one case the courts either stated that the Amendment did not apply to the case or did not mention it at all. In only one case the court held that the act does not constitute a "Combat Action" according to the definition provided by the Amendment.

the purpose of minimizing its relevance. In two cases, the courts explicitly contended that the Amendment had not generated a dramatic change with regard to the scope of the term "Combat Action" and attempted to align the definition added by the Amendment with the interpretation of the term in prior cases.⁹⁵

The fact that in most intermediate cases—in which courts still had leeway on whether to implement the Amendment—they opted for not doing so, might teach us something about the relationship between the courts and the legislature. It suggests that judges preferred maintaining their flexibility in interpreting the term "Combat Action" to applying the definition dictated by the Knesset in the 2002 Amendment. This way, they were left with more latitude for adjudicating the claims as they saw fit.

5.1.2. Weighting Sovereign Immunity in "After the Amendment" Decisions

Another way for courts to preserve their discretion was to give sovereign immunity limited weight in their decisions. This was done by reserving the use of immunity as a sole factor to extreme cases, on the one hand, and by relying on additional considerations in explaining the bulk of the decisions, on the other hand.

Cases after the Amendment, in which courts ruled solely based on sovereign immunity, accounted for only 9% of the cases favorable to the State. Interestingly, delving into the facts of these cases,⁹⁶ the events in question were either an extensive military operation, a targeted killing, or some other form of full-fledged military activity. None of them were anti-terrorism acts as suggested by the new definition of "Combat Action" set forth by the Amendment.

⁹⁵ See CC (Haifa) 305/95 Samudi v. The State of Israel (2005) (Isr.) (finding for plaintiff); see also CDC (Haifa) 1081-04 Zagier v. The State of Israel (2009) (Isr.) (alterations in original) ("[I]n my opinion, the fact that the event in question took place four months before Amendment (No. 4) [the 2002 Amendment] came into force does not change the conclusion that 'targeted killing' constitutes a 'Combat Action,' both according to the current definition of the term in the Act and according to the courts' jurisprudence."). Similar interpretations were offered in cases brought and decided after the Amendment. See, e.g., CC (Kfar Saba) 5305/04 Bahar v. The State of Israel (2007) (Isr.) (finding for the State).

⁹⁶ Except for two cases, in which the claims were dismissed due to the "Conflict Zones" exception, included in the 2005 Amendment, which was later invalidated by the HCJ.

For example, in one of the cases the Haifa District Court adjudicated a claim filed by the estate and dependents of a man and his two wives who were killed during Operation "Defensive Shield."⁹⁷ Courts thus seemed to reserve the "trump card" of sovereign immunity for extreme cases of IDF operations. This further supports the notion that courts were reluctant to accept the limitation of their discretion through the doctrine of sovereign immunity.

Thus, in the vast majority of cases, courts continued to engage in factual and legal discussions examining IDF potential liability, rather than relying solely on sovereign immunity in dismissing the case. After the Amendment, the issue of sovereign immunity became significantly more prevalent in parties' arguments and courts' reasoning,⁹⁸ but courts tended to include this consideration as an *additional* component rather than a main ground for dismissal. Various types of rhetoric were used to incorporate other justifications besides sovereign immunity as part of the reasoning.⁹⁹ The issue of sovereign immunity at times played the lead role in the reasoning, whereas additional discussions, either factual, legal or both, fulfilled a minor, supplementary function. For example, in *Tsabarna*, the Court decided the case on the basis of sovereign immunity, but added the following remark:

"Beyond necessary, I shall add that it was not established that the defendant is liable based on the law of torts. . . . [T]he plaintiff has failed to establish facts vital for proving his case."¹⁰⁰

⁹⁷ CDC (Haifa) 679-04 *The Estate of Hardan v. The State of Israel* (2011) (Isr.) The Court's opinion was only three pages long.

⁹⁸ See *supra* Section 3.2.

⁹⁹ This may indicate discomfort with establishing an unfavorable outcome for plaintiffs solely based on sovereign immunity on the one hand, and reluctance to interpret the Act too loosely on the other. The fact that these are trial courts subject to review by an appellate court may play a role. Magistrate and district court judges, particularly those with aspirations to be promoted to a higher instance, might avoid "creative" interpretations which will be at risk of being overturned by an appellate court. However, judges might also consider this an opportunity to express more judicial "courage," which could win them credit with more senior judges.

¹⁰⁰ CDC (Jerusalem) 6506/04 *Tsabarna v. The State of Israel* (2009) (Isr.) (emphasis added). A similar trend was detected in magistrate courts' decisions. See, e.g., CC (Nazareth) 1253/02 *Omar v. The State of Israel* (2008) (Isr.) (holding that: "[I]t is not without hesitation that I have reached the conclusion that the action conducted by the security forces constitutes a 'Combat Action' and so the State is

In other cases, factual issues or legal questions of liability were the primary components of the reasoning, and were supplemented by immunity as a secondary justification for the outcome, usually gaining only a brief reference. For instance, in *Taisir* the Court noted:

"[T]he discussion could have ended at this point, as the burden to prove the circumstances of his injury is on the plaintiff. . . . [T]he claim should also be denied since the defendant met the burden to show the shooting was conducted in circumstances which justify immunity due to 'Combat Action.'"¹⁰¹

A more radical approach was offered by the Haifa District Court, which noted that sovereign immunity might be revoked in extreme cases of unreasonable or disproportional IDF action.¹⁰² No decision has gone so far as implementing this approach. In fact, some of the judges expressed an inclination in favor of the State and an adherence to the anti-plaintiff approach embodied in the Amendment. Nevertheless, the vast majority of decisions did share this important feature: the judges did not solely examine sovereign immunity. Rather, they delved into the specific facts of the case and/or the substantive legal questions it raised. Once again, we witness courts' unwillingness to comply with the legislature's attempt to limit their discretion to the issue of immunity and preclude judicial scrutiny of IDF actions.

exempted from liability in accordance with the Act, even if its soldiers had been negligent. However, if I am mistaken in this conclusion, I still believe the claim should be denied, since the soldiers' shooting was lawful and aimed at stopping the plaintiffs who were at the time suspected of planning a terrorist attack on Israel.").

¹⁰¹ CDC (Haifa) 585/06 *Taisir v. The State of Israel* (2010) (Isr.); see also CDC (Jerusalem) 3125/01 *The Estate of Aliwa v. The State of Israel* (2009) (Isr.) (discussing at length factual and liability questions, and then adding a brief reference to sovereign immunity), and CC (Jerusalem) 6160/04 *Arar v. The State of Israel* (2010) (Isr.) (conducting a comprehensive factual discussion and holding that the plaintiff did not meet the burden of proof required to establish his case and that the claim is also subject to sovereign immunity due to "Combat Action").

¹⁰² The Court discussed the claim of a ten-year-old who suffered substantial injuries as a result of an operation in the city of Hebron. The Court held that it leaves this question unanswered, as the IDF's conduct had been reasonable. *Zagier*, *supra* note 95.

5.1.3. *Favorable Outcomes Towards Plaintiffs After the Amendment: How?*

Another area, which demonstrates the courts' endeavor to maintain their discretionary power, can be found in cases where plaintiffs won after the Amendment. As noted, even after the 2002 Amendment and the expansion of sovereign immunity it brought about, courts were still able to find for plaintiffs in a non-negligible group of cases. This prompts a closer look at these cases to tease out the methods used by courts in overcoming the sovereign immunity bar.¹⁰³

One approach identified through the analysis of these cases is *narrow interpretation*. That is, reading the term "Combat Action" so that it does not apply to cases of routine military activity. Unlike other trends, this approach distinctly favors plaintiffs. An example is the case of *Abu Samra*, in which the Haifa District Court adjudicated a claim brought after the death of a couple and their 5-year-old son. The three family members were killed while picking vine leaves in a field near the Palestinian city of Jenin as a result of a shooting during an IDF road-opening mission. The Court discussed the liability of the soldiers, as well as the question of immunity, and ruled in favor of the plaintiffs.¹⁰⁴ The Court's interpretative approach¹⁰⁵ might have been inspired by the trying circumstances of the case, particularly the fact that the victims were clearly innocent bystanders.¹⁰⁶

A different approach, one of *disregard*, is seen in a case adjudicated by the Jerusalem District Court and characterized by no

¹⁰³ It should be noted that some cases resulted in a favorable outcome with the State's consent. See, e.g., CC (Jerusalem) 9174/04 Daraweesh v. The State of Israel (2007) (Isr.), and CC (Jerusalem) 2512/03 Saliman v. The State of Israel (2005) (Isr.).

¹⁰⁴ See CDC (Haifa) 420/04 The Estate of Abu Samra v. The State of Israel (2011) (Isr.). See also CDC (Haifa) 661/99 Alwahidi v. The State of Israel (2006) (Isr.).

¹⁰⁵ This approach significantly departed from interpretations given to similar situations in other cases. See, e.g., *Hamarsha*, *supra* note 66.

¹⁰⁶ A similar impression arose from the interview with Adv. Abu-Hussein, who represented the estates of the victims and their dependents in that case; Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012).

less unfortunate circumstances. In the case of *Aramin*, an 11-year-old girl on her way back from school died from a rubber bullet shot by Military Police Corps soldiers, which caused a severe head injury. The Court comprehensively reviewed the evidence of the case and concluded that the soldiers were negligent in conducting the shooting. It did not mention the issue of sovereign immunity.¹⁰⁷ Although this approach was used to a lesser extent than the narrow interpretation approach,¹⁰⁸ it suggests that in some cases, courts may disregard sovereign immunity altogether.¹⁰⁹

These cases suggest that even after the 2002 Amendment courts still had sufficient leeway to find for plaintiffs in certain cases, should they decide to do so. This leeway stems from judges' tendency to review cases on the merits, even in instances of "Combat Action," and to rarely rest the reasoning solely on immunity. This allowed courts to maintain their discretion despite the sovereign immunity limitation and enabled some courts to rule in favor of plaintiffs when they deemed it justifiable.¹¹⁰

5.2. Courts' "Final Word": Costs and Ex-gratia Compensation

Two particular elements in the decisions showed interesting

¹⁰⁷ See CDC (Jerusalem) 9334/07 The Estate of Aramin v. The Ministry of Defense (2010) (Isr.).

¹⁰⁸ A similar approach was taken in the case of *Zidan*, which revolved around a reconnaissance mission of military vehicles that went wrong when the soldiers suspected that a car driving on the road contained a bomb. It was later discovered that the passengers of the car were three women, Israeli residents, on their way to visit a relative in the OPT. Although the Court did not find the soldiers were negligent, it ruled for the plaintiffs based on "considerations of justice and equal distribution of social burdens." CDC (Haifa) 752/04 The Estate of Zidan v. The State of Israel (2011) (Isr.).

¹⁰⁹ This may also be connected to the seniority and status of the presiding judge. The case of *Aramin* was decided by Judge Ef'al-Gabai, who is a senior judge in the Jerusalem District Court. *Supra*, note 107.

¹¹⁰ Adv. Abu-Hussein reflected a similar perception of the courts' approach, focusing on the identity of the judge sitting on the bench. Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012). The same impression was manifested by Adv. Hleihil, and regarding judges' approach to the cases she noted that: "It mainly depends on the particular judge. Some believe these cases do not stand a chance while others are willing to find for plaintiffs in certain cases. However, the general approach is very much against these claims." Interview with Adv. Gada Hleihil (Jan. 12, 2013).

and surprising trends in the quantitative analysis: litigation costs orders and the recommendation to pay *ex-gratia* compensation. A common feature to both these issues is their inclusion in the final part of the decision, usually accompanied by the personal impression of the judge from the case. This discretionary area provides us with a window of sorts into judges' state of mind in adjudicating the cases.

5.2.1. Courts' Rhetoric Regarding Costs Orders

As mentioned, in a substantial group of cases, courts did not issue a costs order against losing plaintiffs. These cases were typically related to bodily injuries rather than property damages. Beyond this consideration, the research found three recurring patterns used to justify a decision not to order plaintiffs to pay costs, often applied in tandem.¹¹¹

First, the *young age of plaintiffs* was repeatedly used as a reason not to order costs, underscoring the loss of future opportunities for the victim. Courts used statements such as, "the plaintiff was a young man, 20 years old at the time of the event,"¹¹² or, "in this tragic case, a young boy was injured,"¹¹³ in justifying their avoidance from issuing costs orders.

Second, courts tended to emphasize the *severity of the injury* sustained by plaintiffs or the gravity of their condition as grounds not to order costs. Courts mentioned justifications such as, "considering the severe injury sustained by the plaintiff, there is no order for costs"¹¹⁴ or, "given the circumstances and considering the

¹¹¹ In addition, a fourth class of decisions did not provide specific justifications for the decisions and simply mentioned that the court is refraining from giving an order for costs "under the circumstances" or due to "considerations of justice." See CC (Nazareth) 5450/05 Najam v. The State of Israel (2008) (Isr.) (dismissing the case on the basis of statute of limitations). See also CC (Jerusalem) 6348/04 Sa'ada v. The State of Israel (2008) (Isr.) (dismissing the case based on lack of liability on the part of the State and sovereign immunity, but suggesting that the State should consider paying *ex-gratia* compensation).

¹¹² CC (Nazareth) 6778/07 Abu-Tabich v. The State of Israel (2011) (Isr.) (mentioning the serious orthopedic disability the plaintiff sustained as justification). See also CC (Nazareth) 07/731 The Estate of Skafi v. The State of Israel (2009) (Isr.).

¹¹³ CC (Jerusalem) 2347/04 Abu-Juda v. The State of Israel (2008) (Isr.) (also noting that the plaintiff was an innocent bystander, who was uninvolved in the event).

¹¹⁴ See CC (Haifa) 1044/98 Alshaid v. The Military Commander in the Gaza Strip (2002) (Isr.).

serious injury of the plaintiff as a result of the shooting, I refrain from ordering legal expenses and attorney's fees."¹¹⁵

Third, as elaborated below, a reference to plaintiffs' *non-involvement in the events* (that is, the fact that they were merely innocent bystanders injured by no fault of their own) was also used as a reason not to order costs.¹¹⁶

It seems that judges' rhetoric in decisions rendered both before and after the Amendment supports the assumption that courts feel discomfort when they find for the State in certain claims, particularly when they pertain to young, severely injured, and innocent bystander plaintiffs, or any combination of the three characteristics. Although courts usually found for the State after the Amendment, they often used their broad discretion on litigation costs as a platform to express their personal impression of the case and its tragic circumstances.

5.2.2. Courts' Rhetoric Regarding *Ex-gratia* Compensation

The topic of *ex-gratia* compensation revealed ambiguous trends in the quantitative analysis. It is thus interesting to look at the language the courts chose to use in referring to this issue.

First, cases in which courts recommended *ex-gratia* compensation were characterized by particularly difficult circumstances. In some,¹¹⁷ the judges explicitly underscored the nature of the circumstances in the recommendation to grant *ex-gratia* payments. For instance, in *Elmatsri*, the Court stated: "Unfortunately, the plaintiff

¹¹⁵ CC (Nazareth) 5682/01 Yusuf v. The State of Israel (2006) (Isr.). For additional examples, see CC (Jerusalem) 4130/02 Razam v. The State of Israel (2006) (Isr.) (holding that: "In light of the plaintiff's injury, I do not see fit to order him to pay costs."); CC (Haifa) 6144/04 Faiz v. The State of Israel (2008) (Isr.); CC (Jerusalem) 9188/04 Manasara v. The State of Israel (2009) (Isr.); CC (Nazareth) 1558/08 Almakus v. The State of Israel (2005) (Isr.); CC (Jerusalem) 98/20790 Issa v. The State of Israel (2005) (Isr.).

¹¹⁶ See CC (Haifa) 4066/02 The Estate of Abad v. The State of Israel (2012) (Isr.). See also CC (Haifa) 1287/94 Hatib v. The State of Israel (2005) (Isr.); CC (Tel-Aviv) 4066/02 The Estate of Abu-Zahara v. The State of Israel (2011) (Isr.) (dismissing a case brought by a bystander Palestinian journalist from the Palestinian city of Jenin based on sovereign immunity and the fact that the plaintiffs did not meet the burden of proof for showing that the injury was caused by IDF shooting); CC (Jerusalem) 01/5503 Abu-Atsi v. The State of Israel (2003) (Isr.).

¹¹⁷ This was the case in a total of six (6) cases.

was injured with no fault of his own . . . Although the remedy for the plaintiff cannot be found within the law of torts, the State would do right if it would consider *ex-gratia* compensation.”¹¹⁸ In other cases, courts suggested that the State should offer compensation, without indicating in the judgment the specific circumstances which justified it, or by referring only to the outcome of the case.¹¹⁹ Similarly, this issue was introduced in one case following the dismissal of the claim based on the statute of limitations.¹²⁰

Second, although only two decisions expressed a negative view of *ex-gratia* payments, they are important in potentially explaining, at least in part, the lesser tendency to suggest *ex-gratia* compensation after the Amendment. In this context, the Be’er-Sheva District Court noted:

“Giving compensation or an exemption from the usual order for costs “*ex-gratia*” constitutes a differential endowment not in accordance with the equal criteria set forth by the legislature. . . . Such appropriation contrasts both with the principle of legality and with the principle of equality.”¹²¹

While recommendations for *ex-gratia* compensation are applied to a lesser extent by courts than the avoidance of costs orders, and prompt various views among judges, they still constitute a space for some judges to express their discomfort with the outcome they reached and to protect their judicial discretion in the face of the legislature’s attempts to limit it.

¹¹⁸ CC (Jerusalem) 9244/07 Elmatari v. The State of Israel (2012) (Isr.). See also *Sa’ada*, *supra* note 111; CC (Haifa) 09-01-17063 The Estate of Zalt v. The State of Israel (2012) (Isr.) (mentioning that there was no dispute regarding the fact that the plaintiff had died as a result of IDF shooting although she was an innocent bystander, and suggesting it would be appropriate if the State compensated the victim’s family at least partially).

¹¹⁹ See Hamarsha, *supra* note 66.

¹²⁰ See CC (Nazareth) 7997/97 Abahara v. The State of Israel (2002) (Isr.). This statement is interesting since as we witnessed in Section 4, *supra*, the State has used the statute of limitations in these claims much more frequently in the decade between 2002 and 2012, in the wake of the Amendment, which shortened the limitations period from seven to two years.

¹²¹ CC (Beit Shemesh) 5193/08 Masari Gabon Ltd. v. The State of Israel (2012) (Isr.). A similar approach was expressed by one of the interviewees, who mentioned his unwillingness to cooperate with the *Ex-Gratia* Committee. Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012).

5.3. *Undefined Domain: Implications of Plaintiff Involvement in the Incident for Remedy Eligibility*

A final issue in which courts enjoy considerable discretion is the implications of plaintiffs' involvement in the events that led to the claim, for instance, by throwing stones or otherwise confronting IDF soldiers ("plaintiff involvement"). Since the law does not explicitly determine the consequences of plaintiff involvement in the cases in question,¹²² courts used this vagueness as an additional opportunity for asserting judicial discretion.

Before the Amendment, the courts treated plaintiff involvement flexibly by using the non-dichotomous concept of contributory negligence, which allows courts to determine various degrees of involvement as a percentage from the overall liability. In contrast, after the Amendment, we find a transition to a dichotomous approach, which views plaintiffs as either involved or uninvolved in the hostilities. This transition was reflected in the quantitative account of the outcomes, showing that while before the Amendment, involved plaintiffs were at times awarded damages, after the Amendment this phenomenon has all but vanished.¹²³ In accordance with this trend, the courts' language has also changed, from reflecting the *level* of plaintiff involvement as a percentage of the overall liability,¹²⁴ to merely determining *whether* the plaintiff was involved. Courts' treatment of uninvolved plaintiffs has also changed after the Amendment, namely, a more favorable treatment towards uninvolved plaintiffs was identified before the Amendment.

In contrast to these changes, the rhetoric of the decisions reflected a similar approach towards plaintiff involvement both before and after the Amendment. In relation to involved plaintiffs, unsurprisingly, courts repeatedly uttered their negative perception of them. For instance, in a decision given *before* the Amendment,

¹²² See Tort Ordinance, 1968, § 64 (as amended) (Isr.) (defining merely the general term "contributory negligence," and omitting a specific reference to this issue in the Act).

¹²³ With the exception of two cases: See CC (Jerusalem) 1412/98 Hanan v. The State of Israel (2003) (Isr.), and CC (Haifa) 643/99 Id v. The Military Commander (2006) (Isr.).

¹²⁴ See, e.g., CC (Jerusalem) 1608/98 Natsha v. The State of Israel (2000) (Isr.) (determining that the plaintiff took part in the event by throwing stones, but deciding to still award compensation, albeit reduced).

the court remarked:

"In the basis of the decision whether to award damages to a victim of IDF shooting in the territories [OPT – G.J.B.] is the distinction between an innocent victim . . . and a casualty injured while conducting a hostile and dangerous activity. In the latter case, the public interest obliges courts to deny the claim."¹²⁵

In decisions rendered *after* the Amendment, courts articulated the same approach.¹²⁶

Interestingly, though, at least in their rhetoric, courts expressed a stringent approach towards innocent bystanders too, noting non-involvement as irrelevant to establishing entitlement for damages. For instance, in the case of *Natser*, decided *before* the Amendment, the Jerusalem District Court noted that the fact that the plaintiff might have been an innocent bystander does not in itself suggest that he should be entitled for damages.¹²⁷ The Kfar-Saba Magistrate Court pronounced an essentially identical view *after* the Amendment.¹²⁸

Hence, though the rhetoric of courts on plaintiff involvement was consistent before and after the Amendment, the outcomes carried a difference in tone. This gap has become somewhat narrower after the Amendment, yet the presence of the plaintiff involvement factor has far from disappeared. This factor was apparent, as we have seen, in cases in which judges ruled in favor of plaintiffs after the Amendment. In such cases, judges based their decision in part on plaintiffs being innocent bystanders to the events.¹²⁹ Moreover, as noted, in costs orders and *ex-gratia* compensation recommendations, courts were more benevolent towards uninvolved plaintiffs after the Amendment. In light of these findings, it seems plaintiff

¹²⁵ CC (Haifa) 1110/94 Sha'at v. The State of Israel (1998) (Isr.).

¹²⁶ See CC (Haifa) 187/99 Halil v. The State of Israel (2007) (Isr.); CC (Haifa) 1008/98 Azuni v. The Military Commander in Judea and Samaria (2007) (Isr.).

¹²⁷ See CDC (Jerusalem) 210/93 The Estate of Natser v. The State of Israel (1995) (Isr.).

¹²⁸ See CC (Tel-Aviv) 5305/04 The Estate of Bahar v. The State of Israel (2007) (Isr.). See also CC (Nazareth) 1088/02 Sarhahn v. The State of Israel (2008) (Isr.).

¹²⁹ See, e.g., CC (Afula) 3254/00 Naaman v. The State of Israel (2005) (Isr.) (holding that: "I do not think the minor inconsistencies in the plaintiff's version change the fact that he was an innocent bystander injured with no fault of his own and it should be noted that he was a 9-year-old boy at the time.").

involvement remains an influential factor used by courts to continue to exercise their discretion after the Amendment.

6. DISCUSSION AND CONCLUSION

The back-and-forth dialogue (at times, more aptly described as a battle) between courts and legislatures has been the subject of abundant doctrinal and empirical scholarship over the years. However, the literature on judiciary-legislature relations has focused predominantly on supreme courts. This Article expands the current scholarship by examining a neglected domain: whether Israeli trial courts adjudicating sensitive political cases interact with the legislature in a mode similar to the Israeli Supreme Court. More specifically, the Study focused on the way courts respond to a legislative change aimed at influencing their case law when adjudicating politically-charged cases.

The analysis of court decisions rendered in tort claims brought by Palestinians against the State of Israel for damages sustained by IDF actions showed an interesting duality in the way trial courts dealt with an amendment to the governing law. On the one hand, the analysis showed considerable compliance with the requirements of the legislature as expressed by the 2002 Amendment and the anti-plaintiff approach the Amendment communicated. This was manifested most clearly by looking at the outcomes of cases: favorable outcomes for plaintiffs decreased significantly following the Amendment, despite a simultaneous rise in the number of claims and their severity. There was also a growing trend of using sovereign immunity and statute of limitations considerations in the opinions. In this sense, the courts can be understood as accommodating the public's mindset regarding the Conflict, as signified by the anti-plaintiff legislation. Per this explanation, the courts acted passively, merely reflecting social attitudes as well as the interests of the political system.¹³⁰

On the other hand, a deeper inquiry into the decisions, both quantitatively and qualitatively, discovered attempts by the courts to protect judicial discretion in the face of the legislative change. Courts were willing to scrutinize IDF actions to a similar extent as

¹³⁰ See Barzilai, *supra* note 46.

they did before the Amendment, relegating the issue of immunity to a secondary role in their decision-making. Courts maintained “pockets” of discretion, regarding litigation costs orders, recommendations for *ex-gratia* compensation, and the weight given to plaintiff involvement. These trends suggest a judicial attempt to defend the institutional power and independence of the courts vis-à-vis the Knesset’s efforts to dictate its desired process.

In this respect, the research indicates that despite the focus of previous literature on supreme courts, lower courts (at least those that deal with sensitive political disputes) might be no less inclined to interact with the legislature through statutory interpretation. Support for this courts-legislature dialogue can be found in the recent legislation regarding state liability for IDF actions. As noted, in 2012, an additional amendment to the Act was enacted. Among other provisions, the 2012 Amendment explicitly obliges courts to rule on sovereign immunity pleas prior to delving into the specific facts of the case.¹³¹ The purpose of the 2012 Amendment seems obvious in light of this Study: to prevent courts from examining IDF actions on the merits in cases where the military action constituted a “Combat Action,” and thus lowering the level of military accountability before the courts. This may reflect a legislative response to courts’ decision-making trends found in this Study. The 2012 Amendment clearly shows that the legislature is trying to confine judicial discretion in the claims to the simple application of “Combat Action” immunity.

However, follow-up research indicates¹³² that since the 2012 Amendment was promulgated, the courts’ approach towards the claims has begun to converge with the legislator’s. The dwindling number of cases in which courts find for plaintiffs,¹³³ and the overwhelming procedural requirements strictly enforced by the

¹³¹ Civil Torts Act, 2012 §§ 2(2) (as amended) (Isr.) (explaining that: “If the State argued as a preliminary argument that it is not liable for the act in question since it constitutes a Combat Action under subsection (a), the court shall consider the argument immediately, and if found that the act was a Combat Action as aforesaid, reject the claim.”).

¹³² See Bachar, *supra* note 24 (noting the change in Israeli courts’ approach towards the claims in question, evident in the willingness to adopt the State’s use of procedure to block claims from being adjudicated on the merits).

¹³³ See Report in Response to a Freedom of Information (FOIA) Query to the MOD (in Hebrew), (Aug. 3, 2015) <http://bit.ly/2a982nf> [<https://perma.cc/6SUC-7RMM>]; Report in Response to MOD FOIA Query (Nov. 13, 2016) (on file with author).

courts on Palestinian plaintiffs bringing tort claims against the State,¹³⁴ seem to suggest that the courts are beginning to line up with the Knesset's anti-plaintiff approach towards these claims.

One question which arises from this Study is *why* courts acted as they did in adjudicating the claims following the 2002 Amendment. Was it a matter of protecting their institutional status, as the neo-institutional approach would argue, or was it judges' personal desire to promote certain values, as other attitudinal models posit? In politically-charged cases, it is difficult to contend that judges' own values would be irrelevant. The courts are undoubtedly affected to some extent by judges' personal views regarding the Israeli-Palestinian Conflict. Yet, in what way does the surrounding reality affect them? Unlike Mautner, who sees the judiciary as representing elite groups who hold liberal values,¹³⁵ this Article suggests a more complex picture by which values pull in different directions on the pro-State versus pro-plaintiff continuum, either criticizing IDF actions that violate Palestinians' human rights, or underscoring Israel's right to defend itself and thus justifying IDF conduct. It seems likely that the political identity of the judge sitting on the bench influences both the rhetoric and outcome of a case.¹³⁶

Still, overall, and whatever their underlying motives, this Article showed that the judges' behavior allowed them to maintain their role in scrutinizing IDF conduct in the OPT. As a result of this oversight, the State was repeatedly required to present evidence regarding the details of military actions in the OPT resulting in injuries or property damage to Palestinians, thus promoting IDF accountability despite the tendency to rule in the State's favor. Moreover, as we have seen, some judges found for plaintiffs in certain cases, even after the Amendment, and signaled the State that it

¹³⁴ See Bachar, *supra* note 24 (describing the categories of procedural barriers blocking Palestinians' claims).

¹³⁵ See MAUTNER, *supra* note 47.

¹³⁶ The following quote from one of the interviews reflects the potential impact of judges' personal values and political views on the outcome of the case, at least in the eyes of the lawyers bringing the cases: "I believe that in the end of the day we are dealing with human beings and regardless of this [the Conflict] judges always go through an internal dialogue with themselves. Eventually, judges are human beings as well; some of them may be more sensitive; some are Arabs and see plaintiffs as regular people; some may be racist. The system has all kinds of judges. The judge you end up with has a lot of influence on how your case turns out." Interview with Adv. Hussein Abu-Hussein (Dec. 17, 2012).

should acknowledge its wrongdoing in still other cases. Nevertheless, perhaps due to judges' concern of appellate court overturn, of legislative override, or of other counter-reactions that would impair their institutional autonomy,¹³⁷ this was done quite rarely. More often, courts employed subtle ways of intervening in the legislature's policy, employing their reasoning and other discretionary tools to this end.

The remaining question is whether the courts were doing everything in their power, considering the hand they were dealt, to maintain their independence and some measure of judicial monitoring of IDF actions. While the separation of powers demands that political priorities be determined by the legislature, judicial independence is crucial to make sure that the outcomes of cases are not simply dictated by the powers-that-be. This is especially true for those disputes in which the authorities themselves are implicated. However, while Edelman speaks to the high value placed on the independence of civil courts by Israeli society,¹³⁸ recent years have seen a decline in the Israeli public's regard towards the courts.¹³⁹ This trend may well impact the capacity of courts, both on the lower levels and on the Supreme Court level, to push back against restrictive legislation like the 2002 and 2012 Amendments.

Indeed, the continuous state of conflict between Israel and the Palestinians requires all courts, not only the Supreme Court, to assume a difficult role: striking a delicate balance between drawing the boundaries of state liability for IDF actions according to the confines imposed by the legislation, and ensuring the State accepts responsibility in adequate cases, thereby exercising a more lenient approach towards plaintiffs when appropriate. This balance demands caution on the part of courts. It requires a firm insistence on an independent judicial system, in order to serve as guardians of human rights values. In this respect, recent trends showing a

¹³⁷ See Dotan, *supra* note 49 (commenting on the Supreme Court's conduct in this respect).

¹³⁸ EDELMAN, *supra* note 60, at 11 (noting that the civil judiciary is seen as the institutional repository of the values that Israelis place on independent, objective, and impartial decision-making).

¹³⁹ In a general survey conducted in 2015, only 30% of the public expressed full trust in the Israeli justice system. Hen Ma'anit, *Survey: All Time Low in the Public Trust in the Legal System, the Parliament and the Police*, GLOBES (2015) (Isl.) (in Hebrew), <http://www.globes.co.il/news/article.aspx?did=1001076264> (last visited Nov. 8, 2016) [<https://perma.cc/Y78P-H6QB>].

stringent approach among courts towards Palestinian plaintiffs are cause for concern. These trends should be further investigated in future studies.

This Study was a first attempt to systematically analyze data and derive insights on tort lawsuits brought by Palestinians against the State of Israel in the context of the Conflict. However, much more research is still needed. Research already underway looks at the use of procedural tools to restrict Palestinians' access to Israeli civil courts.¹⁴⁰ Additional work examines the legal actors who bring the claims and their impact on the litigation.¹⁴¹ Future research should explore the way Palestinian victims perceive their injuries and the remedies for them, as well as their impressions of Israeli court proceedings. This may help illuminate the potential value of such litigation on a broader level, namely whether it can play a role in the resolution of the Conflict. Furthermore, future work should compare the Israeli-Palestinian mechanism to other tools for compensating victims of armed conflict, in order to better assess the mechanism in question. Hopefully, the findings described in this Article will help pave the way for such future research.

¹⁴⁰ Bachar, *supra* note 24.

¹⁴¹ Gilat Bachar, *When Lawyers Go to War: A Study of Plaintiffs' Lawyers in Palestinians' Tort Claims against Israel* (Nov. 2016) (unpublished manuscript) (on file with author) (analyzing the motivations and practices engaged in by lawyers in the context of using tort law to affect social change or mobilize a movement).